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Abstract

In September 2002, President Bush published his first National Security Strategy to the United States' Congress. In this strategy, President Bush asserted a new doctrine of unilateral preemptive self-defense, arguing that this new doctrine is needed to adequately defend a nation against the capabilities and objectives of today's enemies. This new right of preemptive self-defense would be authorized against rogue states and terrorist organizations that attempt to obtain weapons of mass destruction. Although the current right of self-defense is not universally defined, most international scholars and the international community agree the right extends to action taken in self-defense before an armed attack has occurred, if the armed attack is imminent and the use of force in self-defense is both necessary and proportionate. The *Caroline* incident of the mid-1800's established the limits of imminence, necessity, and proportionality for the use of self-defense.

The National Security Strategy argues that the definition of imminent must be expanded to threats that are more distant or merely foreseeable in order to account for the drastic change in technology since the *Caroline* incident. Because of the technology in the mid-1800's, a state that was about to be attacked would be able to adequately defend itself because of the time it took the attacking state to place troops and equipment along its borders. Additionally, because weapons had a limited capacity for destruction, the attacked state would still have the ability to defend itself against an attack that was about to start or had just started. However, current technology allows a rogue state or terrorist organization to attack without warning and the destructive capability of weapons of mass destruction could easily ensure the attacked state will not be able to respond to defend itself.

This paper reviews the right of self-defense as it has evolved over time, culminating in the right as expressed in Article 51 of the United Nations (U.N.) Charter. The international community, through the U.N. Charter and state practice, accepts a right of self-defense, but this right is limited to an attack that is imminent, not merely foreseeable. The U.N. Charter envisioned a system in which the Security Council would maintain international peace and security. However, the Security Council has refused to act in many situations which has led to states acting in self-defense under Article 51 of the U.N. Charter.

This paper also reviews the international community's responses to various acts of state self-defense, including the response after the terrorist attacks of September 11, 2001. This paper concludes that although the international community clearly rallied in favor of self-defense against terrorist actions, the community equally opposed the right of unilateral preemptive self-defense. However, compelling statements and actions by various states, the European Union, and the Security Council reflect the possibility that the Security Council will be willing to take action against rogue states and terrorist organizations that attempt to obtain weapons of mass destruction, thereby eliminating the need for a state to act unilaterally in self-defense. Specific limits to when force should be used to combat these new threats will help guide states in determining how to evaluate situations that are brought before the Security Council.

UNILATERAL PREEMPTIVE SELF-DEFENSE, HAS ITS TIME ARRIVED: ASSESSING THE INTERNATIONAL LEGALITY OF UNILATERAL PREEMPTIVE SELF-DEFENSE IN THE 2002 NATIONAL SECURITY STRATEGY

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> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.
>
> - The National Security Strategy of the United States of America[1]

INTRODUCTION

September 2002 marked a significant revolution in American defensive doctrine – a shift from solely a reactive posture to one that includes unilateral preemptive self-defense – when President Bush released *The National Security Strategy of the United States of America* (National Security Strategy). Although much of the National Security Strategy discusses the need for multilateral action to bring peace to the international community, it also asserts a new doctrine of unilateral preemptive self-defense.[2]

The National Security Strategy asserts that the United States has the right to act unilaterally to preemptively strike rogue states and terrorist organizations that attempt to obtain or use weapons of mass destruction. Arguing that international law has long recognized the right to use anticipatory self-defense, the National Security Strategy asserts

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[1] White House, The National Security Strategy of the United States of America (Sept. 17, 2002), *at* http://www.whitehouse.gov/nsc/nss.pdf, [hereinafter National Security Strategy].

[2] *Id.*

that the right had been conditioned on the existence of an imminent threat.[3] The National Security Strategy states that the definition of imminent must be expanded to enable the unilateral use of preemptive force in self-defense to control rogue states and terrorists that attempt to obtain or use weapons of mass destruction. This change allows states to adequately defend themselves from the capabilities and objectives of today's adversaries.

President Bush argues in his National Security Strategy that the international community must change the current view of imminent under anticipatory self-defense to an expanded view of imminent, allowing for preemptive use of force in self-defense. Several words, anticipatory, interceptive, preemptive, and preventive, are commonly used to describe self-defense depending on the imminence of the attack. Additionally, these words are often used interchangeably or with varying definitions.[4] For purposes of this paper, anticipatory and interceptive self-defense are grouped together and refer to action taken when an attack is imminent, has already been launched, or is about to be launched.[5] Preemptive and preventive are also grouped together and refer to action taken to prevent a threat or capability from

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[3] *See generally,* for classic texts on the right of self-defense, DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (Manchester, 1958); J.L. BRIERLY, THE LAW OF NATIONS (Sir Humphrey Waldock ed., 6th ed. 1963); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (Oxford, New York, 1963); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (3d ed. 2001); LOUIS HENKIN, HOW NATIONS BEHAVE (2nd ed. 1979); MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); MALCOLM N. SHAW, INTERNATIONAL LAW (3rd ed. 1991); Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 455 (1952-II). *See also* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW (1996); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000).

[4] *See* BROWNLIE, *supra* note 3, at 257-58, 366-67; DINSTEIN, *supra* note 3, at 172; SHAW, *supra* note 3, at 693 (using anticipatory and preemption interchangeably); Alan W. Dowd, *In Search of Monsters to Destroy – The Causes and Costs of the Bush Doctrine*, 18 WORLD AND I 280 (2003).

[5] *See* DINSTEIN, *supra* note 6, at 172 (attack is imminent or practically unavoidable); W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 87 (2003) ("A credible claim for anticipatory self-defense must point to a palpable and imminent threat.").

occurring when the threat is more distant or merely foreseeable.[6] Preemptive self-defense requires more speculation about both the hostile intention and capability of the attacking state. Additionally, the term 'weapons of mass destruction' will be used throughout this paper. For purposes of this paper, weapons of mass destruction refer to biological, chemical, nuclear weapons, and their means of delivery.

Every state possesses the inherent, sovereign right of self-defense. This right of self-defense was acknowledged in the *Caroline* incident[7] of the mid-1800s, the preeminent incident detailing the right of self-defense, which has been acknowledged as a customary international right ever since. States created several treaties in the early 1900s to limit the use of force, but those treaties did not discuss the accepted inherent right of self-defense, although states acknowledged the existence of the right of self-defense, including anticipatory self-defense. In the 1940's, states banded together to "to save succeeding generations from the scourge of war . . ."[8] by creating the United Nations (U.N.) Charter with its prohibition on the use of force.[9] The U.N. Charter provides two exceptions to the prohibition on the use of force. Under Chapter VII, the Security Council is authorized to use force, and under Article 51, states, individually and collectively, are authorized to use force in self-defense.[10]

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[6] DINSTEIN, *supra* note 3, at 172. "A claim for preemptive self-defense can only point to a possibility, a contingency." Reisman, *supra* note 5, at 87.

[7] See infra Part II.B.1.

[8] U.N. CHARTER pmbl.

[9] U.N. CHARTER art. 2, para. 4.

[10] U.N. CHARTER art. 39-51.

Because the wording in the U.N. Charter is ambiguous, international scholars and states disagree on whether Article 51 is the only right of self-defense, or if the customary right of anticipatory self-defense coexists.[11] Although there is much debate on the use of self-defense, this paper concludes that the general consensus is that an inherent right of self-defense exists for all states and that right includes the right to act before an armed attack if the armed attack is imminent and the use of force in self-defense is both necessary and proportionate, using the limits established by the *Caroline* doctrine.

The Security Council seldom acts to maintain international peace and security, thereby necessitating that states respond to threats in self-defense. These actions of self-defense and the responses by the international community evidence the acceptance of a right of anticipatory self-defense, especially after the end of the Cold War. The international community has been willing to accept preemptive action in a few limited situations, but is unwilling to accept a general rule allowing for unilateral preemptive use of force in self-defense, even to control terrorists and weapons of mass destruction. However, recent developments after the terrorist attacks of September 11, 2001, and possibly in response to the National Security Strategy, indicate that the international community may accept multilateral use of force through the Security Council to control threats from rogue states and terrorists that attempt to obtain weapons of mass destruction. The international community must create defined limits or criteria for this emerging agreement for the multilateral use of force to ensure this use is perceived as legitimate by all states. These criteria will enable

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[11] There are two main views about the right of self-defense. The restrictive view argues that the only right of self-defense is under Article 51, which is limited to a response to an armed attack. The expansive view argues that the restrictive view does not accurately reflect the intentions of the drafters of the U.N. Charter and that it unreasonably restricts the right of self-defense in such a way as to give the advantage to aggressors. These views will be further analyzed in Part III.B. below.

states to evaluate if future situations require a use of force and put rogue states and terrorist organizations on notice.

Part I reviews the United States' National Security Strategy, why it is required, and what is its purpose. It examines the first strategy released by President Bush focusing on the administration's call for a new international right of unilateral preemptive self-defense.

Part II examines the pre-U.N. Charter evolution of the right of self-defense. It reviews the facts surrounding the *Caroline* incident, the preeminent situation detailing the right of anticipatory self-defense. This part explores how the right of self-defense was addressed in the Covenant of the League of Nations, the Kellogg-Briand Pact, the Nuremberg Charter, and Nuremberg and Tokyo Tribunals. Part III evaluates the U.N. Charter prohibition on the use of force and the two exceptions to this prohibition; the use of force authorized by the Security Council under Chapter VII, and the inherent right of self-defense under Article 51. This part reviews the struggles the Security Council has in using force to maintain international peace and security, resulting in the a wider use of force in self-defense. It then identifies the conflicting views about whether anticipatory self-defense is legal in the U.N. Charter era under customary international law or Article 51, and argues that international scholars generally accept the right of anticipatory self-defense. Part III concludes with a discussion on the limits surrounding the use of the right of anticipatory self-defense.

Part IV reviews the facts surrounding several situations that address the right to use force in anticipatory and preemptive self-defense and the international community's responses to those situations to determine the current status of the right of anticipatory self-defense. The situations reviewed begin with the 1962 Cuban Missile Crisis and culminate

with the 2003 War in Iraq. In many of these situations, the state invoking a right to use force might not have asserted a right of anticipatory self-defense, but international scholars and fellow states discussed the right of anticipatory self-defense in light of the facts of the particular situation. In addition, this part also reviews advances in the international community's willingness to accept multilateral use of force to address threats from rogue states and terrorist organizations attempting to obtain or use weapons of mass destruction following the terrorist strikes on the United States on September 11, 2001.

Part V argues that the U.N. Charter framework has not been eclipsed by various uses of force in anticipatory self-defense; but rather, is adapting to the current threats to international peace and security. This part then analyzes the right of anticipatory and preemptive self-defense in light of the situations reviewed in Part IV, and concludes that while the international community accepts a right of anticipatory self-defense, it does not accept a right of preemptive self-defense. This part argues that the terrorist strikes of September 11, 2002, and the assertions of the National Security Strategy have encouraged the international community to be more willing to accept the use of force as an option to control current threats. This part concludes with a discussion on the limitations the Security Council faces in addressing these threats and the reviews the possible principles for consideration of when the use of force should be authorized.

This paper concludes that following the terrorist strikes of September 11, 2001, the international community seems to be more willing to address future threats by using force, specifically threats by rogue states and terrorists that attempt to obtain weapons of mass destruction. However, this willingness extends only to multilateral use of force, such as allowing the Security Council to deal with the threat under Chapter VII. The international

community does not yet accept the right for a state to unilaterally declare that a possible threat exists and then to use force to prevent that threat from coming to fruition. The speculation required and the possibilities for abuse makes preemptive self-defense unacceptable as a general right in international law. If the international community is truly willing and able to use the threat of force to control rogue states and terrorists, there will be both less of a possibility and less legality in states taking unilateral action claiming self-defense. Specific limits to when force should be used to combat these new threats will help guide states in determining how to evaluate situations that are brought before the Security Council.

I. The National Security Strategy

A. The Goldwater-Nichols Act of 1986

The Goldwater-Nichols Department of Defense Reorganization Act of 1986 amended the National Security Act of 1947 to include a requirement that the President of the United States provide an annual report to Congress detailing the national security strategy of the United States.[12] The purpose of this report is to provide Congress a useful framework for congressional committees dealing with national defense and foreign policy.[13] Additionally,

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[12] The Goldwater-Nichols Department of Defense Reorganization Act of 1986 Pub. L. No. 99-433, § 603(a)(1), 100 Stat. 1074 (codified as amended at 50 U.S.C. § 404a (2000)). The Act requires the President to submit the report on the date on which the President submits the budget for the next fiscal year. The law was amended in 1999, to include a requirement that a new President submit the report to Congress within 150 days after the new President takes office, in addition to the annual report required at the time of the submission of the budget. Pub. L. No. 106-65, §901(b), 113 Stat. 717.

[13] S. REP. NO. 99-280, at 72-73 (1986), *reprinted in* 1986 U.S. CODE CONG. AND ADM. NEWS 2240, at 2240-2241.

Congress requires a clear statement of national security strategy to provide them "the opportunity to participate in the setting of policies and objectives for national defense."[14]

The law requires the President to include, among other items, a comprehensive description of the "worldwide interests, goals, and objectives of the United States that are vital to the national security of the United States. . . . [and] [t]he foreign policy . . . of the United States necessary to deter aggression and to implement the national security strategy of the United States."[15] According to James B. Steinberg, the report is important for two main reasons: it is the most in-depth published description of the national security strategy, and it is used as the template that federal government agencies apply when creating their budgetary and policy strategies.[16]

B. The National Security Strategy of the United States of America

President George W. Bush provided his first strategy the National Security Strategy to Congress in September 2002.[17] In the introductory letter that accompanied the unclassified form of this report,[18] President Bush distills the strategy into three main objectives: "We will defend the peace by fighting terrorists and tyrants. We will preserve the peace by building good relations among the great powers. We will extend the peace by

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[14] *Id.* at 2241.

[15] 50 U.S.C. § 404a(b)(1)-(2) (2000).

[16] James Steinberg is the vice president and director of the Foreign Policy Studies program at the Brookings Institution and former Deputy Assistant to the President for National Security Affairs. James B. Steinberg, A Brookings Press Briefing - Brookings Scholars Evaluate and Analyze President's National Security Strategy Paper, 4 October 2002, at the Brookings Institution, Washington DC, (transcript available at the Brookings Institute), *at* http://www.brook.edu/comm/events/20021004.htm (last visited July 19, 2003).

[17] National Security Strategy, *supra* note 1. Although the law requires the President to submit the first strategy within 150 days of taking office, President Bush did not submit his first strategy until September 2002. *See supra* note 12.

[18] 50 U.S.C. § 404a(c) (2000) (providing for a classified and unclassified form of the report).

encouraging free and open societies on every continent."[19] While all aspects of the strategy relate to each other, this paper will focus on the legality, under international law, of the idea of unilateral preemptive self-defense as asserted in the strategy.

1. United States Proposes International Law Adapt to New Threats

President Bush presents the right of unilateral preemptive self-defense both as policy for the United States and as a lawful right under international law.[20] Statements of the administration, combined with the fact the National Security Strategy claimed that all states, not just the United States, should not use this right as a pretext for aggression, reveal the administration's intention to assert this right in hopes of prompting an evolution of customary international law.[21] Customary international law is created by actions and statements of states combined with the belief that the actions are required or allowed under international law. One way customary international law evolves is for a state to act or present a doctrine and for other states to respond. "[C]ustomary international law is not static. It may be modified over time by new assertions of rights, if other states acquiesce in those assertions. Thus the reactions of other states to the new US policy could affect the rule of the *Caroline* case.[22]

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[19] President George W. Bush, *Introduction* to National Security Strategy, *supra* note 1 [hereinafter Introduction].

[20] *See* Reisman, *supra* note 5, at 90 (discussing that if this right of preemptive self-defense is just a U.S. policy, then it is an exception to international law, rather than a demand for a change in international law); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 109 (June 27) (concerning the importance of evaluating if state justifications are simply statements of their policy or assertion of rules of existing international law).

[21] *See* National Security Strategy, *supra* note 1, at 15.

[22] Frederic L. Kirgis, Pre-*emptive Action to Forestall Terrorism*, AM. SOC'Y OF INT'L L. INSIGHTS, (June, 2002), *at* http://www.asil.org/insights/insigh88.htm (last visited on July 20, 2003). The *Caroline* case is discussed *infra* Part II.B.1.

Throughout the National Security Strategy, starting with his introductory letter, President Bush asserts that the enemies of the United States and the international community have changed. The threat comes not from big armies, but from "shadowy networks of individuals."[23] The National Security Strategy states that America's current enemies are rogue states[24] and terrorists, both of whom are trying to obtain weapons of mass destruction. Defending the United States against these enemies is the first commitment of the administration.

The new threats require a new strategy to ensure mass casualties do not occur.

> Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option.[25]

The National Security Strategy details several non-force ways the international community, working together, can address these threats. It pledges the support of the United States to assist regional partners in curtailing the threats posed by rogue states and terrorists. "We will continue to encourage our regional partners to take up a coordinated effort that isolates the terrorists. Once the regional campaign localizes the threat to a particular state, we will help ensure the state has the military, law enforcement, political, and financial tools necessary to

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[23] Introduction, *supra* note 19.

[24] The National Security Strategy defines rogue states as states that, among other actions, brutalize their own people, ignore international law, attempt to acquire weapons of mass destruction, and sponsor terrorism. *See* National Security Strategy, *supra* note 1, at 14.

[25] *Id.* at 15.

finish the task."[26] The National Security Strategy declares that to effectively fight these enemies, the United States must strengthen its relationship with current allies and build "new partnerships with former adversaries."[27]

The National Security Strategy declares that preemptive action against a threat is one way to counter the threat posed by rogue states and terrorists. The National Security Strategy adds that international law has long accepted the right of nations to defend themselves before an attack occurs, but that this anticipatory self-defense is conditioned on "forces that present an imminent danger of attack."[28] "The United States has long affirmed the right to anticipatory self-defense – from the Cuban Missile Crisis in 1962 to the crisis on the Korean peninsula in 1994."[29] Due to the destructive power of the weapons rogue states and terrorists attempt to use; however, the definition of 'imminent' as a specific and near certain attack must be expanded to include attacks that remain uncertain as to the time and place. The National Security Strategy claims that "[w]e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[30]

The National Security Strategy states that the United States will respond to threats from enemies of the United States through cooperation with other states, but will reserve the

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[26] *Id.* at 6.

[27] *Id.* at 14.

[28] *Id.* at 15. Many writers simply state the right of anticipatory use of force against an imminent attack is accepted in international law. *See* Keir A. Lieber & Robert J. Lieber, *The Bush National Security Strategy*, *in* 7 U.S. FOREIGN POLICY AGENDA 32, 33 (December 2002) *at* http://usinfo.state.gov/journals/itps/1202/ijpe/ijpe1202.htm. (last visited on July 19, 2003); Marcus Corbin, *The Bush National Security Strategy: A First Step*, Center for Defense Information (Sept. 26, 2002) *at* http://www.cdi.org/national-security-strategy/washington.cfm (last visited on June 25, 2003).

[29] Condoleezza Rice, *A Balance of Power that Favors Freedom*, *in* 7 U.S. FOREIGN POLICY AGENDA, *supra* note 28, at 5, 6.

[30] National Security Strategy, *supra* note 1, at 15.

right to act preemptively and unilaterally, if the need arises.[31] The National Security Strategy provides very little guidance on the use of preemptive self-defense, but states that it is limited to rogue states and terrorists who attempt to obtain or use weapons of mass destruction, and will not be used in all cases. Additionally, it strongly cautions that states should not use preemptive self-defense as a "pretext for aggression."[32]

2. Administration's Statements

Shortly after the National Security Strategy was released, Condoleezza Rice, Assistant to the President for National Security Affairs, explained the administration's limits on the preemptive use of force.[33] The use of preemption must be taken when a threat is so potentially catastrophic that it cannot be contained, and even then, in only a very few cases and with great caution. Rice stated prior to using preemption, states must "exhaust other means, ... [t]he threat must be very grave[, a]nd the risks of waiting must far outweigh the risks of action."[34] Rice added that multilateral cooperation is needed to resolve conflicts and the problems caused by terrorists.

According to William H. Taft IV, the legal advisor to the U.S. Secretary of State, "[t]he concept of armed attack and imminent threat now must take into account the capacity of today's weapons and the tactics of those who may hold them."[35] Taft stated that as

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[31] *See id.* at 6.

[32] *Id.* at 15. *See also* Lieber & Lieber, *supra* note 28, at 32-33.

[33] Rice, *supra* note 29.

[34] *Id.* at 6.

[35] William Howard Taft IV, Address to the Foreign Policy Association – Preemptive Force: When Can it Be Used? Implications for Iraq and North Korea (Jan. 13, 2003), *in* XI and XII FOREIGN POL'Y F. 195, 200 (2002).

conditions for the use of preemptive action, a state must face overwhelming evidence of an imminent threat, exhaust peaceful remedies, and carefully consider the consequences.[36]

In a speech given at Georgetown University, Richard Haass, the Director of Policy Planning Staff at the Department of State, elaborated further on the National Security Strategy and the need for states to deal with new threats.[37] Haass argued that the world consensus is evolving to show that sovereignty is not absolute, but rather it is contingent on the state fulfilling fundamental obligations. Haass posited that when a state does not live up to the obligations, "it risks forfeiting its sovereign privileges – including, in extreme cases, its immunity from armed intervention."[38] Haass detailed three situations where the global consensus is evolving to allow for the norm of non-intervention to be disregarded – when a state commits or fails to prevent genocide or crimes against humanity; aids or supports terrorists or is unable to control terrorists operating within its borders; or "take[s] steps that represent a clear threat to global security," by displaying a "history of aggression and support for terrorism [and then] pursu[ing] weapons of mass destruction."[39] Haass argued that a state in the last situation loses its right against intervention, and faces preemptive action to prevent the state from gaining the destructive capability.[40]

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[36] *Id.* at 201.

[37] Richard N. Haass, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, Washington, DC, (Jan. 14, 2003) *at* http://www.state.gov/s/p/rem/2003/16648.htm (last visited on July 20, 2003).

[38] *Id.*

[39] *Id.*

[40] This is one example of the interchangeable use of the words "anticipatory" and "preemption." Haass actually uses the word anticipatory, but his definition reveals that he is discussing preemptive because the action is taken to prevent a state from acquiring a threat, rather than to prevent an imminent attack. *See supra* notes 4-7 and accompanying text.

According to Haass, international lawyers generally accept the right of a state to take preemptive action against an imminent threat, but find problematic the right to take preventive action to destroy a developing capability before it becomes an imminent threat. He argued, as does the National Security Strategy, that the distinction is no longer valid because of the inability to discern when an attack is imminent and because of the mass destructive capability of weapons of mass destruction. However, Haass also stated that sovereignty is still an important right in international law and intervention in a state must be carefully considered and only undertaken in limited situations.[41]

To properly appraise the claims made by the Bush administration for an evolving norm allowing for states to use unilateral preemptive force in self-defense against rogue states or terrorists that attempt to obtain weapons of mass destruction, one must evaluate current international law. This evaluation includes assessments of the U.N. Charter and customary international law by international scholars and assessments of state practice to see if a right currently exists, or in the alternative, if a right of unilateral preemptive self-defense is evolving.

II. Pre-Charter Self-Defense Doctrine In International Law

A. Sources of International Law

To determine whether the international law of self-defense includes a right of anticipatory self-defense, one would review the sources of international law and how the right of self-defense has evolved over time. Article 38(1) of the International Court of

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[41] *Id.*

Justice (I.C.J.) lists the sources of international law.[42] Although Article 38 discusses the sources the I.C.J. will use in interpreting international law for application in deciding cases before it, the list is "regarded as a complete statement of the sources of international law."[43] The four principle sources of international law listed in Article 38 are (1) treaties; (2) custom; (3) general principles of law; and (4) judicial decisions and scholarly writings, as subsidiary sources.[44]

The principles of international law on the prohibition of the use of force and the right of self-defense are found in treaties such as the U.N. Charter, customary international law, judicial decisions, and scholarly writings. Treaties are agreements between states. They can be unilateral or multilateral, but they only bind the states that ratify the treaty. Sometimes treaties put into writing what has already evolved as customary international law. For example, Article 2(4) of the U.N. Charter forbids the use of force by any Member State against any state, regardless of membership in the United Nations. Article 2(6) then imposes the same prohibition against use of force on any state, regardless of membership in the United Nations. By the time the U.N. Charter was enacted, customary international law already prohibited the use of force.[45]

Customary international law is the settled practice of states accompanied by the *opinio juris sive necessitates*, meaning the belief the "practice is rendered obligatory by the

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[42] STATUTE OF THE I.C.J. art. 38, para. 1.

[43] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (4th ed. 1990).

[44] STATUTE OF THE I.C.J. art. 38, para. 1.

[45] *See infra* Part II.B.4.

existence of a rule of law requiring it."[46] Customary international law is evidenced by the acts and statements of states combined with other states' reaction to the acts. International courts, another source of international law, have addressed the international laws of use of force and self-defense through the Nuremberg and Tokyo Tribunals and the I.C.J.[47]

B. Evolution of the Self-Defense Doctrine

An inherent right of self-defense has existed for hundreds of years. Grotius acknowledged the right of self-defense, but with limitations. Grotius stated, "For in order that self-defence [sic] may be lawful, it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour [sic], but also regarding his intention."[48] This right was considered a natural, inherent right that could not be limited by law.[49]

The right of self-defense developed over time culminating in the U.N. Charter. To properly evaluate how the U.N. Charter is interpreted today, one must look to the language of the Charter, I.C.J. cases, writings of international scholars, and specific state practices. A brief review of the evolution of the right of self-defense leading up to the U.N. Charter is essential in understanding the current right of self-defense.

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[46] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 108-09 (June 27).

[47] *See infra* Part II.B.4. (discussing the Nuremberg and Tokyo Tribunals). *See infra* Parts III.B. and C. (discussing the I.C.J. case and advisory opinion).

[48] ALEXANDROV, *supra* note 3, at 7, citing Hugo Grotius, De Jure Belli Ac Pacis, Book II, Chapter XXII, Section V, para. 1, *in* CLASSICS OF INTERNATIONAL LAW 549 (Francis W. Kelsey trans., 1925).

[49] Self-defense was considered a basic, natural drive inherent in human nature; therefore a right that came from nature, not from positive law. *See* ALEXANDROV, *supra* note 3, at 5-6 & nn.22-31.

1. The *Caroline* Incident

The *Caroline* incident is accepted as providing the description of the right of anticipatory self-defense, both leading up to the U.N. Charter and in evaluating the right of self-defense after the ratification of the U.N. Charter.[50] The following description of the facts of the *Caroline* incident is from articles by Robert Y. Jennings and Timothy Kearley.[51]

During the Canadian Rebellion of 1837, many American nationals just across the Canadian border actively assisted the Canadian rebels against the British. The United States attempted to prevent American nationals from aiding the rebellion, but the attempts were largely unsuccessful. Canadian rebels, supported by some American nationals, took over Navy Island, on the Canadian side of the Niagara River.

The *Caroline*, a ship belonging to American nationals, traveled from the United States to Navy Island carrying men, supplies, and weapons for the rebels. Colonel McNab, the commander of local British forces, was aware of the *Caroline's* activities and decided to destroy it while it was in Canadian territory. The *Caroline* returned to United States territory before the colonel could destroy it, so he attacked it in United States waters, killed two people, and sent the burning ship over Niagara Falls.

The United States protested the violation of American sovereignty in a few diplomatic notes about the incident exchanged between the Canadian and United States

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[50] The Nuremberg Tribunal and the *Nicaragua* case quoted the *Caroline* formulation of necessity and proportionality as a standard for evaluating self-defense. *See* Nuremberg Judgment, 1 Trial of the Major War Crim. Before Int'l Mil. Tribunal 208, 218-22 (Nuremberg, 14 November 1945-1 October 1946), *reprinted in* 41 AM. J. INT'L L. 205, 207 (1947) (citation omitted); *Nicaragua*, 1986 I.C.J. at 94. *See also* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).

[51] *See* Jennings, *supra* note 44, at 50; Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 328 (1999).

diplomats. Little was resolved until after 1840, when the United States arrested a British subject, Alexander McLeod, and charged him with murder and arson for his participation in the Caroline incident.

When the British protested the arrest and trial, stating the attack on the *Caroline* was in self-defense, the United States Secretary of State, Daniel Webster, responded by letter to Lord Ashburton.[52] In that letter, Mr. Webster included a copy of his April 24, 1841, letter to Mr. Fox, the British Ambassador in Washington, stating conditions necessary for a claim of self-defense.[53] Mr. Webster stated that the issue of self-defense is to be judged "by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground of justification."[54] Mr. Webster then explained the principles required for a claim of self-defense: necessity – "instant, over-whelming, leaving no choice of means, and no moment for deliberation . . . ."[55] and proportionality – "that the local authorities . . ., even supposing the necessity of the moment . . . did nothing unreasonable or excessive; since the act justified by the necessity of self-defence [sic], must be limited by that necessity, and kept clearly within it."[56]

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[52] 30 BRIT. AND FOREIGN ST. PAPERS 193 (Webster to Ashburton) (1841-2). "Lord Ashburton was appointed special minister to the U.S. for the purpose of settling several difficult disputes between the United States and Great Britain, including the dispute over the Caroline and also U.S.-Canadian boundary issues." Kearley, *supra* note 51, at 329 n.13.

[53] Although mentioned in the letter to Mr. Ashburton, the text of Mr. Webster's letter to Mr. Fox is in the previous volume. 29 BRIT. AND FOREIGN ST. PAPERS 1129, 1138 (Webster to Fox) (1840-1).

[54] *Id.* at 1133.

[55] *Id.* at 1138.

[56] *Id.*

Lord Ashburton responded, stating the United Kingdom agreed with Mr. Webster's description of the international law of respect for the territorial integrity of each state, and further described the exception for acts of self-defense.[57] Lord Ashburton stated self-defense "must be so for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[58] Lord Ashburton explained that British action met Mr. Webster's requirements:

> I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?[59]

The incident of the *Caroline* in 1837 changed self-defense "from a political excuse to a legal doctrine."[60] The two parties to the dispute, the United States and the United Kingdom, agreed to Mr. Webster's defined principles for the use of self-defense—necessity and proportionality—which helped to make these principles valuable precedent.[61]

2. The Covenant of the League of Nations

In the early 1900's the Covenant of the League of Nations (Covenant) put restrictions on the use of war.[62] While it did not prohibit the use of war, the Member States agreed that

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[57] 30 BRIT. AND FOREIGN ST. PAPERS 195, 195-6 (Lord Ashburton to Webster) (1841-2).

[58] *Id.* at 196.

[59] *Id.*

[60] Jennings, *supra* note 50, at 82.

[61] ALEXANDROV, *supra* note 3, at 19 & n.104.

[62] *Id.* at 29-49 (providing an in-depth analysis of the impact of the League of Nations on the use of force and the right of self-defense).

war between states was a matter of international concern and the Covenant created a system of peaceful settlement of disputes that restricted the right to resort to war. The Covenant, however, prohibited war only in the form of exceptions, and accepted war to resist aggression and as a means to settle disputes if the suggested procedure for peaceful settlement did not resolve the dispute.

The Covenant did not address the right of self-defense. The absence of this right has a few possible explanations. First, the right of self-defense was an inherent right and did not need to be described.[63] Second, the prohibition against war did not include a prohibition against force used in self-defense; therefore no written right of self-defense was required.[64] After the Covenant was in place, most states argued the right of self-defense when they used force against another state, regardless whether a need for self-defense truly existed.[65]

Several other agreements, in addition to the Covenant, were made between states to further limit or define the limits of use of force, and in conjunction, the right of self-defense.[66] These agreements, combined with the frequent claim to the right, led to the tendency of the Council of the League of Nations (Council) to evaluate a state's claim to self-defense, thereby encouraging states to rely on the Council to act rather than immediately using force. For example, the Council evaluated Greece's claim of the right to invade Bulgaria in self-defense after a Greek officer was shot during a frontier skirmish with

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[63] *See* ALEXANDROV, *supra* note 3, at 37 & n.48.

[64] *Id.* at 37.

[65] *See generally id.* at 37; BOWETT, *supra* note 3, at 124.

[66] *See* ALEXANDROV, *supra* note 3, at 41-49 (discussing the Draft Treaty of Mutual Assistance of 1923, the Protocol for the Pacific Settlement of International Disputes, and the Locarno Agreements).

Bulgaria.[67] The Council determined that Greece violated the Covenant by occupying Bulgaria based on the minor skirmish that led to the occupation. The Council's review of the situation indicated that a state's claim of self-defense to use force could be reviewed by an international organization and declared legal or illegal.[68]

3. The Kellogg-Briand Pact

The Covenant and subsequent agreements did not prohibit the recourse to war; therefore, several states enacted the Kellogg-Briand Pact (Pact) in 1929 to exist under the authority of the League of Nations.[69] The Pact condemned the "recourse to war for the solution of international controversies and renounce[d] it as an instrument of national policy."[70] The Pact itself did not detail a right of self-defense, but the negotiating history clearly emphasized that the Pact would not restrict or impair the inherent right of self-defense in any manner. Although notes exchanged by the states discussed the inherent right of self-defense, the right was never actually defined as the states accepted the customary international law as limited to situations meeting the *Caroline* requirements of necessity and proportionality. This was affirmed in the Nuremberg Tribunals when the Tribunal addressed the right of anticipatory self-defense.[71] The inherent right of self-defense included defense

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[67] *See generally* ALEXANDROV, *supra* note 3, at 37-49; BOWETT, *supra* note 3, at 125-31; BROWNLIE, *supra* note 3, at 66-75.

[68] ALEXANDROV, *supra* note 3, at 49.

[69] ALEXANDROV, *supra* note 3, at 52 n.6, citing *Treaty Providing for the Renunciation of War as an Instrument of National Policy (Pact of Paris)*, signed August 27, 1928, entered into force July 24, 1929, 94 LNTS 57, 2 Bevans 732, 46 Stat. 2343, USTS No. 796. For a detailed discussion of the Kellogg-Briand Pact and the right of self-defense as understood at that time, see generally *id.* at 51-76; BOWETT, *supra* note 3; BRIERLY, *supra* note 3; BROWNLIE, *supra* note 3; Waldock, *supra* note 3.

[70] BRIERLY, *supra* note 3 at 408.

[71] *See infra* Part II.B.4.

against actual or imminent attack and possibly included the right to protect the lives and property of nationals.[72]

In the United States' negotiating note concerning the inherent right of self-defense, Secretary Kellogg stated that every nation "alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action."[73] Many scholars interpret Secretary Kellogg's statement about the self-judging aspects of the right of self-defense narrowly to refer only to the initial decision by a state on whether the circumstances called for resort to force in self-defense.[74] Therefore, a state's decision to use self-defense is subject to evaluation by other states, as mentioned by Secretary Kellogg, and to judicial determination.[75]

Although the Covenant and the Pact only applied to the states that ratified them, the "general obligations contained in them, prohibiting recourse to war for the settlement of disputes and requiring disputes to be settled by pacific means . . ." is binding on all states as part of customary international law.[76] The *Caroline* principles of the right of self-defense limited by necessity and proportionality became part of customary international law as states consistently discussed and upheld the obligations without voicing disagreement with them.

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[72] *See* BROWNLIE, *supra* note 3, at 241, 250. Although the Council rejected Japan's claim of self-defense in the Manchurian dispute in 1931 and 1932, the Council did not reject the claim that the *Caroline* principles applied to a claim of self-defense. *See* ALEXANDROV, *supra* note 3, at 68-69, 188-90.

[73] ALEXANDROV, *supra* note 3, at 54, citing Dispatch of April 23, 1928, in 1 FOREIGN RELATIONS OF THE UNITED STATES 1928, at 36-37 (1942).

[74] *See id.* at 62-63 & nn.62-68. *See also* BRIERLY, *supra* note 3 at 407-08; BROWNLIE, *supra* note 3, at 237-39.

[75] *See* BOWETT, *supra* note 3, at 262 (stating the state using self-defense will make the initial decision on the need for self-defense, but that decision is then subject to evaluation by an impartial international organ).

[76] *See* BRIERLY, *supra* note 3, at 410.

4. The Nuremberg Charter, Nuremberg and Tokyo Tribunals

The Nuremberg Charter and the findings of the Nuremberg and Tokyo Tribunals of the 1940s affirmed the customary law of the right of self-defense and the prohibition against the aggressive use of force.[77] Additionally, the Nuremberg Tribunal accepted the right of anticipatory self-defense, citing the *Caroline* limits of necessity and proportionality as conditions on the right of self-defense – "[p]reventive action in foreign territory is justified only in the case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation.'"[78] The Tribunal, however, ruled against Germany stating Germany was unable to demonstrate "an intention formed in good faith and honesty of conviction to protect one's own safety, that safety being immediately threatened."[79]

Japan raised the plea of self-defense in the Tokyo Tribunal concerning the declaration of war by the Netherlands prior to any actual attack. The Tribunal rejected Japan's claim, but recognized the right of the Netherlands to anticipate the attack in self-defense based on the fact that Japan had planned an attack on the Netherlands and had ordered the attack to begin.[80]

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[77] The Nuremberg Charter was part of an international agreement that provided for the prosecution and punishment of war criminals of the European Axis powers after World War II. *See* ALEXANDROV, *supra* note 3, at 73 & n.121. For a more complete discussion of the Tribunals, see BOWETT, *supra* note 3, at 138-145; TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 253-66 (1996).

[78] Nuremberg Judgment, 1 Trial of the Major War Crim. Before Int'l Mil. Tribunal 208, 218-22 (Nuremberg, 14 November 1945-1 October 1946), *reprinted in* 41 AM. J. INT'L L. 205, 207 (1947).

[79] BOWETT, *supra* note 3, at 143.

[80] ALEXANDROV, *supra* note 3, at 76; BOWETT, *supra* note 3, at 139-41.

In addition to accepting a right of anticipatory self-defense, both the Nuremberg and Tokyo Tribunals rejected the claim that a state has the right to judge for itself the right to use, and ultimate the legality of, self-defense. The Nuremberg Tribunal stated "[b]ut whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[81]

The Nuremberg and Tokyo Tribunals, which occurred around the time the U.N. Charter was adopted, affirmed that customary international law at the time of the U.N. Charter accepted a right of anticipatory self-defense and a prohibition on the use of force. The next issue to address is whether this right was incorporated into the U.N. Charter or alongside the U.N. Charter.

III. Self-Defense Doctrine and the U.N. Charter

The main purpose behind the U.N. Charter is to promote peace and international stability. The Preamble of the U.N. Charter states that the people of the United Nations desire "to save succeeding generations from the scourge of war, . . ." and therefore, the people resolve "to unite [their] strength to maintain international peace and security . . . ."[82] Article 1 details the purposes of the U.N. Charter centering on the goal of maintaining international peace and security.[83] To facilitate this, Article 2(3) requires all Members to settle international conflicts peacefully; and Article 2(4) declares a general prohibition

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[81] Nuremberg, 41 AM. J. INT'L L. at 207.

[82] U.N. CHARTER pmbl.

[83] U.N. CHARTER art. 1. *See also* MCCORMACK, *supra* note 77, at 188-190.

against the use of force.[84] The U.N. Charter provides for two exceptions to the prohibition against the use of force: the use of force authorized by the Security Council under Chapter VII and the inherent right of self-defense under Article 51.[85]

A. Security Council Authorization for Use of Force

The U.N. Charter envisions a system where Member States resolve their disputes peacefully. If they are unable to do so, the states bring the dispute to regional organizations, the Security Council, or the Court for peaceful resolution.[86] If a situation arises that could affect international peace and security, the Security Council has the primary responsibility to enforce and restore peace, not the individual Member States.[87] In order to respond to the situation, the Security Council must first determine a situation is a threat to the peace, breach of the peace, or act of aggression, under Article 39.[88] Once the Security Council determines the existence of a threat, breach, or act of aggression, it may then impose measures, non-force or force, to resolve the situation.

The ideal situation would be that the Security Council finds either a threat to international peace, breach of the peace, or act of aggression under Article 39, and then implements non-force measures in accordance with Article 41. If non-force means are inadequate, then the Security Council calls for military action under Article 42 using the

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[84] U.N. CHARTER art. 2, para. 3-4.

[85] *See* U.N. CHARTER art. 39-51 (Chapter VII).

[86] U.N. CHARTER art. 33-38, 52.

[87] The Security Council has primary responsibility for the maintenance of the international peace and security, and the Member States allow the Security Council to act on their behalf. U.N. CHARTER art. 24, para. 1.

[88] "The Security Council shall determine and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

standing United Nations military forces provided for in Article 43, or authorize regional organizations to use force under Article 53.[89]

One problem with this system is the standing armed force has never come to fruition as an enforcement tool. Additionally, the other enforcement tools of the Security Council authorizing Member States to act in concert or through regional organizations to resolve the conflict has seldom worked because of individual Sates' interests, political pressures, and the veto power of members of the Security Council encountered mainly during the Cold War.[90] For instance, from 1945 to 1990, the Soviet Union "pursued a policy of indefinite expansion supported by the aggressive use of armed force and backed by its Security Council veto."[91] The inability of the Security Council to act prevented it from dealing automatically with incidents under Article 39, thereby preventing the Security Council from creating basic principles for these types of actions like it has for peacekeeping actions.[92] Additionally, the concern with maintaining world order under a constant threat of a global nuclear war during the Cold War was a large factor that influenced states, the U.N., and international scholars to argue for restraint on the unilateral use of force to a response to an armed attack.[93] At the

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[89] U.N. CHARTER art. 39, 41-43, 53.

[90] In countless situations since the inception of the U.N. Charter, mainly during the Cold War, the Security Council has been unable to act upon the aggression by a Member State because either it was unwilling to act or because a veto prevented the Security Council from acting. *See* MCCORMACK, *supra* note 77, at 195-97; Eugene V. Rostow, *The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?* 85 AM. J. INT'L L. 506, 506-07 (1991).

[91] Rostow, *supra* note 90, at 507.

[92] *Id.* at 506-07. Even during the Cold War, the Security Council was able to act in countless peacekeeping actions, which allowed the Security Council to create a handbook to provide guidance for these types of actions. The Cold War vetoes prevented the Security Council from gaining experience in using force to address aggression by states. *See* SEAN D. MURPHY, HUMANITARIAN INTERVENTION 319 (1996). *See also* GRAY, *supra* note 3, at 150-53.

[93] *See* MURPHY, *supra* note 92, at 140-142, 355. *See infra* Part III.

same time, the inability of the Security Council to act resulted in states acting unilaterally in self-defense, shifting the emphasis from Article 39 to Article 51.[94]

However, since the end of the Cold War, the Security Council has been able to expand its definition of "threats to the peace" and take action in ways it was previously unable to because of the Cold War alliances and threats.[95] This expansion has mainly been in humanitarian efforts,[96] but the Security Council's authorization for states to use force against Iraq's aggression in Kuwait in 1991 raised hopes that the Security Council would continue acting to maintain international peace and security.[97] The Security Council attempted to expand U.N. peacekeeping operations into Chapter VII peace enforcing operations with little success, so it then had to rely on Member States to use force in several humanitarian situations in the 1990s acting under Security Council Chapter VII authorization.[98] Although the Cold War no longer affects states decisions in the Security Council, economic and political issues do, thereby providing limitations on the ability of the Security Council to act.[99]

Although the Security Council has authorized the use of force more frequently since the end of the Cold War, most of these actions concerned humanitarian issues, not aggression by other states or state actors, thereby continuing the need for individual states to act alone or

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[94] MCCORMACK, supra note 77, at 121.

[95] *See* MURPHY, *supra* note 92, at 143-44, 284; GRAY, *supra* note 3, at 153.

[96] *See* MURPHY, *supra* note 92, at 284.

[97] *See* GRAY, *supra* note 3, at 153.

[98] *Id.* at 187 (listing the situations in Rwanda (1994), Haiti (1994), Albania (1997), and the Central African Republic (1997)).

[99] *See* MURPHY, *supra* note 92, at 282, 357.

in a coalition to address these threats.[100] The Security Council seemingly authorized enforcement action during the Cold War in Korea and after the Cold War in Iraq. Korea was not really an enforcement action, however, because the Security Council was only able to deal with the situation for the two months that the Soviet Union boycotted the Council.[101] In the end, Korea was a collection self-defense action, not an enforcement action through the Security Council. Even Iraq in 1991 was not an enforcement action. The Security Council treated the military campaign as the affair of Kuwait and the states that aided Kuwait.[102]

When the Security Council is unable to act, another United Nations' option is to work through the General Assembly.[103] In 1950, the General Assembly adopted the Uniting for Peace Resolution[104] and used it to recommend use of force against North Korean forces that invaded South Korea.[105] However, resolutions by the General Assembly are only recommendations – not binding or enforceable; and the Uniting for Peace Resolution has not been employed since the Korean War.[106]

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[100] Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 839 (2001). *See infra* Part IV.

[101] Rostow, *supra* note 90, at 508.

[102] *Id.* at 509.

[103] *See* U.N. CHARTER art. 10-12. "The General Assembly may discuss any question or any matters within the scope of the present Charter, . . . and, . . . may make recommendations to the members of the UN, or to the Security Council, or to both on any such questions or matters." *Id.* art. 10.

[104] G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No.20, at 10, U.N. Doc. A/1775 (1950), *at* http://www.un.org.

[105] At the beginning of the Korean War, the Soviet Union boycotted the Security Council, which allowed the Security Council to ask Member States to aid Korea. Once the Soviet Union returned, the Security Council was unable to act because the Soviet Union threatened to use its veto. The General Assembly passed the Uniting for Peace Resolution stating that if the Security Council was unable to act in matters of threats to the peace, breach of the peace, or acts of aggression, the General Assembly would make recommendations for collective measures to be taken to restore international peace and security. *See* MCCORMACK, *supra* note 77, at 203-04.

[106] See *id.* at 200-05 (discussing the role of the General Assembly in the maintenance of peace and security, including the Uniting for Peace Resolution).

Although the framers of the U.N. Charter intended the Security Council to maintain international peace and security, they also recognized the right of a state to use force in self-defense in Article 51.

B. The Right of Self-Defense and Anticipatory Self-Defense

The second exception to the prohibition against the use of force in the U.N. Charter is the right of self-defense under Article 51. Because Article 51 is an exception to the prohibition against the use of force, it can only be fully understood by briefly examining Article 2(4). Although U.N. organizations such as the I.C.J. have addressed the right of self-defense,[107] these issues have not been determinatively answered. These decisions will be reviewed below, but the meaning of the right of self-defense has also been "shaped by the actions and reactions of states and the opinion of publicists and scholars,"[108] therefore these will also be addressed below.

The plain meaning of the wording as opposed to a realistic application of the ambiguous guidelines in both Articles 2(4) and 51 raise serious questions as to exactly what use of force the Charter prohibits and what is the extent of the right of self-defense. To further muddy this debate, international scholars argue over the meanings of "territorial integrity and political independence" and "armed attack."

1. Article 2(4) and Article 51

Article 2(4) states "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or

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[107] *See infra* text accompanying notes 110-12, 130-33.

[108] Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 40 (2d ed. 1991) [hereinafter RIGHT V. MIGHT].

in any other manner inconsistent with the Purposes of the United Nations."[109] The I.C.J. defined use of force in the *Nicaragua* case[110] broadly. It also stated that the prohibition against use of force as detailed in the U.N. Charter is essentially the same as the customary international law prohibiting the use of force.[111] The I.C.J., however, distinguished 'grave uses of force,' which amount to armed attack and give rise to the right of self-defense, from 'less grave uses of force' which are simply prohibited by Article 2(4), but do not provide for the right of self-defense.[112] Scholars disagree on whether terrorist attacks rise to the level of an armed attack,[113] but this paper focuses on the use of self-defense prior to actual armed attacks so this argument will not be examined here.

Article 51 states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ."[114] Scholars differ on the extent that current customary law of self-defense includes the right to act in response to an imminent threat of

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[109] U.N. CHARTER art. 2, para. 4.

[110] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 96-97, 100-01 (June 27).

[111] *Id.*

[112] *Id.* at 101, 103.

[113] *See* ALEXANDROV, *supra* note 3, at 182-88 (providing a good overview of the various arguments). *See also* MCCORMACK, *supra* note 77, at 266-69.

[114] U.N. CHARTER art. 51. The right of self-defense was discussed, but not initially included in the drafting of the U.N. Charter. After the drafting of Article 53, which prevented regional organizations from taking enforcement action unless authorized by the Security Council, several Member States were concerned that Article 53 might be read to limit the right of collective self-defense as provided for through the regional organizations. The drafters then discussed and included Article 51. *See, e.g.,* Alexandrov, *supra* note 3, at 77-92; BOWETT, *supra* note 3, at 182-184.

aggression.[115] They also differ on whether the right of anticipatory self-defense is included in Article 51 or it is solely found in customary international law.[116] Generally, there are two main views on the Article 51 right of self-defense. The restrictive view argues that Article 51 limits self-defense to only situations of armed attack, thereby prohibiting any pre-Charter customary right of anticipatory self-defense.[117] The counter-restrictive or expansive view is that Article 51 affirms the customary international law of the right of self-defense, including the right of anticipatory self-defense.[118]

2. Competing Views

a) Restrictive View

Some scholars narrowly interpret Article 51 to mean that a state may only act in self-defense when an armed attack has occurred, and the act must be limited by the principles of necessity and proportionality.[119] This restrictive view generally excludes anticipatory self-defense. However, many restrictive scholars acknowledge that a state does not have to wait

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[115] *See* David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, *in* RIGHT V. MIGHT, *supra* note 103, at 109, 122 (stating that the inherent right of self-defense includes the right to respond to imminent threats of aggression); "The more common opinion is that customary right of self-defence [sic] is also accorded to states as a preventive measure." DINSTEIN, *supra* note 3, at 165. *But see* GRAY, *supra* note 3, at 112 (stating that although there is some acceptance of the right to anticipatory self-defense, most states argue a wide definition of armed attack); "This more permissive interpretation of article 51 found favor with some commentators, but little with governments." Henkin, *supra* note 108, at 45.

[116] DINSTEIN, *supra* note 3, at 167-68 (arguing that Article 51 applies only in situations of armed attack, but notes that there is a strong school of thought that believes that Article 51 includes other forms of self-defense that are accepted in customary international law).

[117] *See* BROWNLIE, *supra* note 3, at 275-278 & 275 n.2, 366-68; DINSTEIN, *supra* note 3, at 165-173, 184; SHAW, *supra* note 3, at 695 & nn. 59-60.

[118] *See* BOWETT, *supra* note 3, at 188-92; MCDOUGAL & FELICIANO, *supra* note 3, at 232-41; Waldock, *supra* note 3, at 497-98. *See also* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 73 (1993).

[119] *See supra* note 117 and accompanying text.

until it has been attacked to defend itself.[120] To address this, they stretch the definition of armed attack to include attacks that "have begun to occur," thereby allowing for a form of anticipatory self-defense. These scholars basically agree that anticipatory self-defense is legitimate under Article 51; they are just reluctant to use the word "anticipatory." Professor Ian Brownlie, a noted international scholar, acknowledges that self-defense to intercept an attack that has begun is legal.[121] In fact, he acknowledges that the advance in technology may make the difference between attack and imminent attack negligible.[122] Another noted international scholar, Yoram Dinstein, also allows for self-defense to intercept an imminent attack.[123] Malcolm Shaw, a noted international scholar, argues that the definition of armed attack is flexible enough to include armed attacks that are "imminent and unavoidable."[124]

One problem with the restrictive view is that it assumes a defending state will be able to adequately defend itself once action has occurred, but it does not account for new technologies.[125] The restrictive view would claim that a state is not allowed to respond to the threat of a nuclear attack until the nuclear weapons have already been launched.[126] If the state facing attack is not able to able to detect or stop the attack after it has started, then the state faces annihilation. States are unwilling to allow this to happen.

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[120] *See infra* notes 121-24.

[121] BROWNLIE, *supra* note 3, at 366-68.

[122] *Id.*

[123] DINSTEIN, *supra* note 3, at 171-72

[124] SHAW, *supra* note 3, at 695 & nn. 59-60.

[125] To limit the right of self-defense beyond the strict limits of the *Caroline* incident does not make sense with the increase in speed and power of offensive weapons. *See, e.g.*, Waldock, *supra* note 3, at 498.

[126] *See* MCCORMACK, *supra* note 77, at 127.

Similarly, a second problem occurs when restrictive scholars try to account for the advance in technology by widening the definition of armed attack to include actions taken to start an armed attack – a last irrevocable act.[127] Not only is it hard to determine what the last irrevocable act is or when the last irrevocable act occurred, but also it does not account for advances in technology that can make this idea obsolete.[128] "Thus, the whole tenor and effect of consistently requiring a 'last irrevocable act' would seem to be to compel the target state to defer its reaction until it would no longer be possible to repel an attack and avoid damage to itself."[129]

In the *Nicaragua* judgment, the I.C.J. addressed the concept of armed attack.[130] The I.C.J. stated that "armed attack" as used in Article 2(4) is defined by customary international law.[131] The I.C.J. then stated that under customary international law, armed attack includes "not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to' an actual armed attack conducted by regular forces. . ."[132] The I.C.J. further stated that assisting rebels by providing weapons or other support would be a threat or use of force, but not rise to the level of armed attack. Although the I.C.J. discussed in detail the actions that would

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[127] *See* MCDOUGAL & FELICIANO, *supra* note 3, at 239-41.

[128] By the time certain weapons or weapons platforms have been deployed, the ability to defend against them is minimal. *See id.*at 240.

[129] *Id.*

[130] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 103 (June 27).

[131] *Id.* at 94, 101-103.

[132] *Id.* at 103 (citation omitted).

constitute an armed attack, it did not discuss when an armed attack actually begins or whether response to an imminent attack would be lawful.[133]

Restrictionists argue that reading Article 51 to include a customary international right of anticipatory self-defense would open the flood gates to states using force then defending the aggression by calling it anticipatory self-defense. This is not a strong argument because the use of force in anticipatory self-defense is still restricted by the judgment of the international community, which will apply the limits of necessity and proportionality, thereby limiting the potential abuses.[134]

b) Counter-restrictive View

Other scholars argue for a broad reading of Article 51 that would include the right of anticipatory self-defense under the *Caroline* guidelines of necessity and proportionality.[135] Although this argument is more realistically addresses modern technology and fully incorporates the history of the right of self-defense and the drafting of the U.N. Charter, this view, like the restrictive view, involves a twisting or redefining of some words in the U.N. Charter.

The counter-restrictive view argues that the U.N. Charter did not intend to limit the customary right of anticipatory self-defense. States maintain their rights under customary international law unless they specifically intend to give up or limit those rights through a

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[133] *Id.* at 94.

[134] Customary international law requires a high degree of imminence before a claim for the use of anticipatory self-defense to be legal. MCDOUGAL & FELICIANO, *supra* note 3, at 237. *See also* MCCORMACK, *supra* note 77, at 138.

[135] *See supra* note 118.

treaty.[136] The negotiating history of Article 2(4) evidences that states did not intend to limit the customary right of anticipatory self-defense. During the drafting of Article 2(4), the Member States specifically stated this article would not impair the inherent right of self-defense.[137]

Another way this view attempts to allow for a right of anticipatory self-defense is to propose that Article 2(4) does not prohibit certain uses of force in self-defense because the intent of self-defense is not to violate the territorial integrity or political independence of a state.[138] This argument is an unnecessary stretch and is not realistic. States do not accept the concept that a state can drop a bomb in another state and yet claim it does not violate territorial integrity based on the intention of the bombing state.[139] Another problem is that if this line of reasoning is accepted, it opens up potential for abuse – any state can attack another state and claim the action is legal because it was not intended to violate territorial integrity or political independence. Additionally, this argument does not account for the drafting history of Article 2(4). The words "territorial integrity and political independence"

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[136] *See* BOWETT, *supra* note 3, at 185.

[137] The Rapporteur covering Article 2(4) specifically stated: "The use of arms in legitimate self defense remains admitted and unimpaired." BOWETT, *supra* note 3, at 185 & n.3 citing Report of Rapporteur of Committee 1 to Commission I, as adopted by Committee 1/I, 6 U.N.C.I.O. 446, 459. *See also* MCDOUGAL & FELICIANO, *supra* note 3, at 234.

[138] BOWETT, *supra* note 3, at 150-53, 185-86. *See also* MCCORMACK, *supra* note 77, at 133-138 & nn.58-71 (summarizing J. Stone's similar arguments and the examples provided by Louis Henkin and Anthony D'Amato); ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 79 (1987).

[139] *See* BROWNLIE, *supra* note 3, at 265-268. *See also* MCCORMACK, *supra* note 77, at 133-138. *See also* states' responses to Israel's bombing of the Osirak facility, *infra* Part IV.B (arguing that Israel's attack on the facility was an attack against Iraq's territorial integrity and political independence).

were never intended to limit the prohibition on the use of force, but to protect the smaller states that "wanted the written guarantee of respect for their rights of sovereignty."[140]

The drafting history of Article 51 also reveals that the framers did not intend to limit the right of self-defense. The initial drafts of the U.N. Charter did not contain a specific right of self-defense, because like the Covenant and Kellogg-Briand Pact, this right was understood to be inherent.[141] Article 51 was drafted to ensure that Article 53, which stated that regional organizations could not use force unless authorized by the Security Council, did not impede the inherent right of collective self-defense.[142] It was not drafted to place restrictions on the inherent right to use force in self-defense, which included the right of anticipatory self-defense.[143]

Humphrey Waldock, a noted international scholar, argues that rejecting a right of anticipatory self-defense is unreasonable.[144] The U.N. Charter requires states to take their disputes to the U.N. for resolution if they are unable to resolve the conflict peacefully.[145] Waldock, however, posits "if the action of the United Nations is obstructed, delayed or inadequate and the armed attack becomes manifestly imminent, then it would be a travesty of

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[140] *See* BROWNLIE, *supra* note 3, at 265-268; HENKIN, *supra* note 3, at 291-92; MCCORMACK, *supra* note 77, at 137, 159-162 & nn.32-37.

[141] *See supra* Parts III.A.2-3. *See generally* BOWETT, *supra* note 3, at 182.

[142] U.N. CHARTER art. 53. *See also* BOWETT, *supra* note 3, at 182-184; MCCORMACK, *supra* note 77, at 167-184.

[143] MCCORMACK, *supra* note 77, at 179. Article 51 does specifically impose two restrictions on the right of self-defense once the right is used. A state who uses force in self-defense must report the use to the Security Council and must desist in its use once the Security Council has taken action to maintain international peace and security. U.N. CHARTER art. 51.

[144] Waldock, *supra* note 3, at 498.

[145] U.N. CHARTER art. 37.

the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow."[146]

Other actions and documents after the creation of the U.N. Charter indicate the acceptance of an inherent right of anticipatory self-defense, although the restrictive and counter-restrictive views disagree about the full meaning of some of them.[147] In 1946, the General Assembly adopted a resolution stating that the Nuremberg Charter and Judgments correctly stated customary international law, thereby providing strong evidence for the right of anticipatory self-defense.[148] The Report of the United Nations Atomic Energy Commission asserted that a violation of a treaty dealing with nuclear weapons could "give rise to the inherent right of self-defence [sic] recognized in Art. 51."[149] A few years later, in 1950, Pakistani invaded Kashmir and argued anticipatory self-defense.[150] During a discussion of the situation in the Security Council, the only country that disputed the legitimacy of an inherent right of anticipatory self-defense was India.[151] Derek Bowett, a counter-restrictionist international scholar, argues these two examples establish that the U.N. Charter did not intend to inhibit the customary right of anticipatory self-defense.[152] Brownlie, a restrictionist, argues the Atomic Energy Commission is just a subsidiary organ of

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[146] Waldock, *supra* note 3, at 498 (reading Article 51 to exclude the doctrine of imminence allowed under the *Caroline* incident would protect the aggressor, which is not logical).

[147] *See* BOWETT, *supra* note 3, at 189-91.

[148] G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc A/236, at 1144 (1946). *See* BOWETT, *supra* note 3, at 138-145; BRIERLY, *supra* note 3 at 411; George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321, 358-59 & nn.247-48 (1998). *See supra* Part II.B.4.

[149] BOWETT, *supra* note 3, at 189 & n.2 citing U.N. Doc. AEC/18/Rev.1 at 24.

[150] *Id.* at 189.

[151] *Id.* (citation omitted).

[152] *Id.*

the Security Council and therefore does not have any authoritative analysis, although he admits that the General Assembly adopted the Commission's statement.[153]

Both the restrictive and the counter-restrictive views accept some form of anticipatory self-defense, limited by necessity and proportionality, but they disagree on if the right is included in Article 51 or in a coexisting customary international law right of self-defense. The restrictive view broadens the definition of armed attack and the counter-restrictive view argues that the customary international law of anticipatory self-defense exists alongside the U.N. Charter.

C. Self-Defense: A Customary International Law and Article 15 Right

In the *Nicaragua* case, the I.C.J. clarified that there is both a customary right of self-defense and a right of self-defense under Article 51, but did not address anticipatory self-defense.[154] The I.C.J. stated that the U.N. Charter itself refers to pre-existing customary international law in Article 51.[155] Although the U.N. Charter recognizes the right of self-defense, it does not regulate all aspects of its content. The I.C.J. acknowledged that a customary right of self-defense exists and fills in the gaps left by the U.N. Charter. The I.C.J. pointed out that Article 51 "does not contain any specific rule whereby self-defence [sic] would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."[156]

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[153] BROWNLIE, *supra* note 3, at 276-77 & 277 n.1.

[154] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (stating that because of the facts of this specific case, the I.C.J. would not consider the "lawfulness of a response to the imminent threat of armed attack . . . .").

[155] *Id.* at 94.

[156] *Id.*

In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the I.C.J., addressed the *Nicaragua* case, and added that "[t]he submission of the exercise of the right of self-defence [sic] to the conditions of necessity and proportionality is a rule of customary international law . . .", but "[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[157] The I.C.J. held that the customary international law of self-defense is essentially the same as the right discussed in Article 51, and that each can be used to interpret the other, but did not address the question of the legality of anticipatory self-defense, either under Article 51 or under customary international law.[158] The I.C.J. also stated that customary international law on a particular issue is determined by state practice, treaties states have signed, and statements made by states.[159]

1. Limits of the Right of Self-Defense and Anticipatory Self-Defense

It is clear through this review that international scholars strongly disagree on the acceptance of the right of anticipatory self-defense and that both sides twist, or add to, the definition of words in the U.N. Charter to account for the realistic need for states to be able to respond in anticipatory self-defense, be it through a right in Article 51 or customary international law. The I.C.J, while avoiding the issue of anticipatory self-defense, stated that a customary international right of self-defense exists with the Article 51 right and each one can be used to interpret the other. However, the two competing views do agree, and the

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[157] Legality of the Threat or Use of Nuclear Weapons, 1996(I) I.C.J. 226, at 245 (July 8).

[158] *See Nicaragua*, 1986 I.C.J. at 96-97; Henkin, *supra* note 108, at 47.

[159] *See Nicaragua*, 1986 I.C.J. at 98-101. *See also* BROWNLIE, *supra* note 3, at 87.

I.C.J. implies, that the limits of necessity and proportionality, as described in the *Caroline* incident,[160] apply to the use of anticipatory self-defense.[161]

a) Necessity

Webster, in the *Caroline* incident, stated that to use force in anticipatory self-defense, a state must face a threat of imminent attack, leaving no choice of means and no moment of deliberation.[162] In essence, the threat must be truly imminent and there must be no other way, short of force, to address the threat.[163] Before using force, a state must exhaust efforts to resolve the situation by peaceful means, diplomacy, and any other way short of the use of force. If a full-scale invasion occurs, the requirement of necessity has been met and the invaded state may respond to expel the aggressor.[164] However, absent a full-scale attack, the requirement of necessity encourages dispute resolution without resorting to full-scale hostilities.[165]

Some scholars also state that the use of self-defense also requires the response to be immediate – no "undue time-lag between the armed attack and the exercise of self-

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[160] *See supra* Part II.B.1.

[161] *See supra* text accompanying notes 154-59 (discussing the *Nicaragua* case and the advisory opinion concerning nuclear weapons). "States and writers still refer to [the *Caroline* incident] . . . to support the necessity and proportionality limitation." GRAY, supra note 3, at 105. *See also* DINSTEIN, *supra* note 3,at 183-84, 219. "Article 51 words 'inherent right' refer to customary international law extant in 1945, when the Charter was drafted. Customary law relating to self-defense is best expressed in Webster's 1841 note to Fox which constitutes the Caroline doctrine language." Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 506 (1990) (citation omitted).

[162] *See supra* note 55.

[163] *See* DINSTEIN, *supra* note 3, at 184; AREND & CLARK, *supra* note 118, at 72.

[164] DINSTEIN, *supra* note 3, at 208 (noting the issue of necessity becomes moot in the face of an all out invasion).

[165] *Id.*

defense."[166] This requirement is broad enough to both allow for the necessity requirement to be met and to give the state time to prepare its defenses.[167]

b) Proportionality

Although proportionality is discussed in the *Caroline* incident, it is hard to determine exactly what proportionality entails.[168] Proportionality essentially requires that the degree of force used to respond in self-defense be similar to the scale and effects of the original use of force.[169]

Scholars raise several questions concerning proportionality. These questions are mentioned here, but not resolved as they are outside the scope of this paper.[170] Is the threat only the most recent act of aggression or can it include a series of acts? Must self-defense stop when the immediate attack is prevented or does it include the right to disrupt the aggressor's ability to strike again? Primarily, proportionality imports a standard of reasonableness in the response to force by counter-force.[171]

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[166] DINSTEIN, *supra* note 3, at 184.

[167] *See id.* at 200, 212-213; Scheffer, *supra* note 115, at 122.

[168] *See* DINSTEIN, *supra* note 3, at 184.

[169] *Id.* at 198.

[170] For detailed analysis of three approaches to the issue of proportionality, see AREND & BECK, *supra* note 118, at 165. Dinstein argues that proportionality requires self-defense in small-scale attacks to be limited to the scale and effect of the originating attack; but in situations of war in self-defense, proportionality does not apply thereby allowing the defending state to use force sufficient to require the unconditional surrender of the aggressing state. DINSTEIN, *supra* note 3, at 197-98, 208-12.

[171] DINSTEIN, *supra* note 3, at 184.

2. Requirement to Report Acts of Self-Defense to the Security Council

Article 51 requires states to report acts of self-defense to the Security Council immediately.[172] The failure to report does not mean the act of self-defense is not justified, but it may be considered evidence against the legitimacy of the claim of self-defense.[173] In *Nicaragua*, the I.C.J. stated that the customary right of self-defense does not require a report to the Security Council, but the absence of a report can indicate whether the state truly believed it was acting in accordance with the right of self-defense.[174]

3. Investigation of a Claim of Self-Defense

As discussed in previous sections, although a state may argue it is the only proper judge of its own decision to use force in self-defense, the international community has continually rejected that argument.[175] A state has the right to unilaterally decide that self-defense is initially warranted in a certain situation, but other states, the Security Council, or the General Assembly may evaluate any use of force in self-defense.[176]

States may individually address the legality of another state's actions, which may or may not result in an official response from the Security Council and General Assembly. The Security Council may ultimately decide if an armed attack has occurred and if there is a right

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[172] "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council . . ." U.N. CHARTER art. 51.

[173] *See* GRAY, supra note 3, at 91.

[174] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 105, 121 (June 27). The Court did not address if failure to comply would invalidate the claim if the Charter provisions were applicable. Just as reporting an act of self-defense does not automatically validate the claim, the failure to report would not automatically invalidate the claim. *See* DINSTEIN, *supra* note 3, at 190-91; ALEXANDROV, *supra* note 3, at 149.

[175] *See supra* Parts II.B.2 through II.B.4.

[176] *See* DINSTEIN, *supra* note 3, at 185-187; Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 121 (1986).

to self-defense.[177] A state acting in self-defense will not have to stop unless the Security Council affirmatively adopts a resolution stating an armed attack has not occurred or a right to self-defense no longer exists because the Security Council has taken action to maintain international peace and security.[178] Responses by the Security Council or General Assembly, however, are not always definitive on the international acceptance of the action because they are political, not judicial bodies.[179] Additionally, during Security Council discussions on the use of force in self-defense, many states do not address the underlying claim of anticipatory self-defense while others argue in favor or against the use of anticipatory self-defense as applied only to the specific facts.[180] The Security Council usually avoids addressing the underlying doctrine in order to obtain agreement on a resolution.[181]

IV. Post-Charter State Practice Involving The Use Of Self-Defense

Part III.B. established that international scholars agree that a right of anticipatory self-defense exists in either customary international law or the U.N. Charter framework. Part III.C. established that the right of self-defense, limited by necessity and proportionally, exists in both customary international law and Article 51, with each influencing the interpretation of the right of self-defense, although the I.C.J. did not specifically address the right of

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[177] ALEXANDROV, *supra* note 3, at 146. *See also* DINSTEIN, *supra* note 3, at 186 (stating that according to the *Nicaragua* case, the I.C.J. may also make decisions concerning the legality of the right to use force in self-defense).

[178] For a state to be legally obliged to desist acting in self-defense, the Security Council must either rule that the state does not have a right to act in self-defense or the Security Council must impose measures to maintain the international peace and security. If the resolution does not clearly maintain international peace and security, states argue they retain the right to act in self-defense. *See* DINSTEIN, *supra* note 3, at 189-190.

[179] *See id.* at 188.

[180] *See* GRAY, *supra* note 3, at 89-90. *See also infra* Part IV.

[181] *Id.* at 90.

anticipatory self-defense. To fully understand the right of anticipatory self-defense and the National Security Strategy's claim of a right of preemptive self-defense, it is important to review state practice to see how states have addressed the right. Therefore, this part discusses specific claims of anticipatory and preemptive self-defense advanced or discussed on several occasions since the U.N. Charter's adoption.

A. 1962 Cuban Missile Crisis

Cuban Missile Crisis of 1962 is one of the earliest situations that highlighted preemptive self-defense and the problem of the immediacy of a threat concerning weapons of mass destruction.[182] Concerning this situation, President Kennedy said,

> We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril. Nuclear weapons are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.[183]

In October 1962, intelligence experts informed President Kennedy that the Soviet Union was assembling delivery systems for intermediate range ballistic missiles to be placed in Cuba.[184] President Kennedy contemplated using preemptive air strikes against Cuba to prevent the missile sites from becoming operational.[185] Instead of missile strikes; however, he ordered a blockade to prevent the transport of the missiles to Cuba stating that he was

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[182] ALEXANDROV, *supra* note 3, at 154.

[183] LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM'S TYRANNY AND AMERICA'S MISSION 86 (2003).

[184] AREND & BECK, *supra* note 118, at 74.

[185] Richard F. Grimmett, *U.S. Use of Preemptive Military Force: The Historical Record, in* 7 U.S. FOREIGN POLICY AGENDA, *supra* note 28, at 41, 42. *See also* Dowd, *supra* note 4 (stating that the United States began preparing for a preemptive strike against Cuba in February, months before the deployment of Soviet missiles to Cuba was confirmed).

acting in "the defense of our own security and of the entire Western Hemisphere."[186] In international law, a blockade was generally accepted as a use of force and therefore a violation of Article 2(4), absent some lawful right to use force.[187] The United States immediately informed the Security Council of its actions, stating the weapons were offensive and a threat to international peace and security.[188] The United States did not justify its actions as self-defense against an armed attack; but rather under Article 6 the Rio Treaty as a response to threats to the peace other than armed attack.[189]

Although the Unites States did not justify its actions as self-defense to preempt a threat, the question of preemptive self-defense was argued widely in legal scholarship.[190] International law scholars disagree as to whether the threat of weapons of mass destruction can affect the right of self-defense.[191] The discussion in the Security Council focused more on the threat of the missiles, not necessarily on whether a right of anticipatory or preemptive

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[186] AREND & BECK, *supra* note 118, at 75, 220 n.22, citing Address by President Kennedy, in R. Kennedy, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 156 (1968).

[187] AREND & BECK, *supra* note 118, at 75.

[188] ALEXANDROV, *supra* note 3, at 155 & 155 n.168, citing to the United States letter to the Security Council of Oct. 22, 1962, U.N. SCOR, 17th Sess., U.N. Doc. S/5181, Suppl. for October-December, 1962, at 146-48.

[189] ALEXANDROV, *supra* note 3, at 155 & 155 n.168, citing to the Resolution of the Council of the Organization of American States of Oct. 23, 1962, 47 DEP'T ST. BULL. 722-23 (1962). *But see* Rostow, *supra* note 90, at 515 (arguing that the Rio Treaty was not a permissible legal basis for action because a regional organization may not act without the prior approval of the Security Council; therefore the only permissible basis for the action in this situation was the inherent right of self-defense).

[190] AREND & BECK, *supra* note 118, at 75 & 220 n.25.

[191] One scholar argues that although there was no armed attack or threat of imminent armed attack in the Cuban situation, other nations overwhelmingly agreed that the Russian attempt at sudden and secret changes in the nuclear balance was an illegal use of force justifying a limited and proportionate American use of force in response. *See* Rostow, *supra* note 90, at 515. *But see* ALEXANDROV, *supra* note 3, at 158. The author states that "expanding the scope of the right of self-defense to cover such situations is not without risk," ALEXANDROV, *supra* note 3, at 158, and that the deployment of weapons to Cuba could "hardly serve as a legal basis for an armed response in self-defense" ALEXANDROV, *supra* note 3, at 159.

self-defense existed.[192] Generally, states' approval for the United States' actions was based along political affiliations of the Cold War.[193] However, even the countries that opposed the United State's action seemed to indicate that if the missiles were offensive rather than defensive "there may have been some justification for preemptive action."[194]

The Cuban Missile Crisis was one of the first times that the argument was made that the concept of "threat to the peace" has been changed to include the danger caused by nuclear weapons.[195] Although the United States did not claim action under a right of preemptive self-defense, some states did address the issue in the Security Council. The acceptance of this right was varied and based along Cold War affiliations, but it does provide some acknowledgment of a right of preemptive self-defense. However states might have been accepting of this right because it maintained the status quo concerning nuclear weapons and the use of force was limited to an embargo, rather than strikes on another country.

B. 1981 Israel Strike on Iraq's Osirak Nuclear Reactor

On 7 June 1981, Israel dropped two bombs on Osirak, Iraq's nuclear reactor.[196] Israel informed the Security Council it acted in anticipatory self-defense to prevent Iraq from

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[192] ALEXANDROV, *supra* note 3, at 156.

[193] *Id.* at 156 & n.174.

[194] AREND & BECK, *supra* note 118, at 75-76. *See also* ALEXANDROV, *supra* note 3, at 156 & n.173 (stating that Ghana acknowledged a right of anticipatory self-defense, but argued the *Caroline* principles were not met because the United States could not prove offensive purpose of the weapons nor that the threat warranted the embargo).

[195] *See* ALEXANDROV, *supra* note 3, at 157 & n.180 (stating that prior to the Cuban Missile Crisis, the Atomic Energy Commission indicated that a violation of a nuclear weapons treaty might give rise to the inherent right of self-defense).

[196] For an in-depth discussion of the facts surrounding Iraq's intention to develop nuclear weapons and Israel's response, see MCCORMACK, *supra* note 77, at 38-110.

developing and using a nuclear bomb against Israel.[197] Israel claimed it used the least amount of force necessary to stop the threat, including striking at a time the fewest number of civilians were expected to be there.[198]

Based on Iraq's past hostile relations with Israel, Israel was convinced that if Iraq obtained nuclear weapons capability, it would use it against Israel.[199] Israel attempted to resolve the issue peacefully prior to bombing the facility,[200] but Iraq did not officially recognize Israel's existence, hamstringing any discussions with Iraq. Israel argued that the fact it submitted a draft resolution to the U.N. recommending a multi-lateral treaty to establish a nuclear-weapon-free zone in the Middle East is further evidence that Israel tried to resolve the situation peacefully. Additionally, Israel engaged in diplomatic relations with France from 1974 to 1981 to encourage France not to supply Iraq with nuclear technology. France insisted that the use of the reactor was peaceful as Iraq had signed the Treaty on the Non-Proliferation of Nuclear Weapons[201] (NPT) and allowed its facilities to be inspected. The United States, at the request of Israel, also put diplomatic pressure on France, but that did not prevent the sale of the nuclear reactor.[202]

The international community immediately responded and condemned Israel's strike on the reactor as an attack against the territorial integrity and political independence of

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[197] Statement of Israeli representative, U.N.SCOR 36th Sess., 2280th mtg., U.N. Doc. S/PV.2280 (1981).

[198] MCCORMACK, *supra* note 77, at 105, 109-10.

[199] MCCORMACK, *supra* note 77, at 101-104, 107-09.

[200] For a discussion of Israel's attempts to peacefully resolve the threat, see MCCORMACK, *supra* note 77, at 107-09.

[201] Treaty on the Non-Proliferation of Nuclear Weapons, G.A. Res. 2373, U.N. GAOR, 22nd Sess., Supp. No. 16A, U.N. Doc. A/6716/Add.1 (1967).

[202] MCCORMACK, *supra* note 77, at 107-09.

Iraq.[203] The Security Council unanimously passed Security Council Resolution 487 "strongly condemn[ing] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."[204] The Security Council Resolution 487 expressed deep concern that Israel's attack could "explode the situation in the area."[205] The General Assembly also acted, specifically condemning Israel's bombing of the Osirak nuclear facility as an act of aggression in violation of the U.N. Charter and international law, and condemned Israel's "threats to repeat such attacks on nuclear installations if and when it deems it necessary."[206]

During discussions prior to the Security Council resolution, some states argued that Israel had not been attacked; therefore Israel did not have the right of self-defense.[207] Several other states acknowledged a right of anticipatory self-defense, but stated that Israel should have exhausted peaceful means to resolve the issue because it did not face an instant and overwhelming necessity requiring use of force in self-defense.[208]

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[203] *See* statements in U.N. SCOR, 36th Sess., 2280st-2288th mtgs., U.N. Doc. S/PV.2280-2288 (1981).

[204] S.C. Res. 487, U.N. SCOR, 36th Sess., UN Doc. S/RES/487 (1981), *reprinted in* 75 AM. J. INT'L L. 724 (1981), *available at* http://www.un.org/Docs/scres/1981/scres81.htm.

[205] *Id.*

[206] G.A. Res. 27, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/27 (1981), *available at* http://www.un.org/documents/ga/res/36/a36r027.htm.

[207] Several states stated that Article 51 allowed for the right of self-defense only if an armed attack occurred; however, they did not clarify what would constitute the start of an armed attack. They also rejected a right of preemptive self-defense claiming it would lead to lawlessness and aggression. *See* statements by Brazil, U.N. Doc. S/PV.2281, *supra* note 203; Spain, U.N. Doc. S/PV.2282 *supra* note 203; Yugoslavia, U.N. Doc. S/PV.2283 *supra* note 203; Syria, U.N. Doc. S/PV.2284 *supra* note 203; Guyana, U.N. Doc. S/PV.2286 *supra* note 203; Mexico, U.N. Doc. S/PV.2288 *supra* note 203 (stating also that Israel's action was not justified because it had no proof the reactor was for military purposes).

[208] Some of these states stated the *Caroline* principles of necessity – instant, overwhelming need for defense – were not met. *See* statements by Uganda and United Kingdom, U.N. Doc. S/PV.2282 *supra* note 203; Ireland and Sierra Leone, U.N. Doc. S/PV.2283 *supra* note 203; Niger, U.N. Doc. S/PV.2284 *supra* note 203. Several states said that Israel did not exhaust its peaceful options and should have raised its concern to the Security Council or other international bodies. *See* statements by Japan, U.N. Doc. S/PV.2282 *supra* note 203;

Not only was there a question of imminence, but it seems there also was a question of intent. If Iraq had intended to develop nuclear weapons, it would have been over a year, at a minimum, before Iraq would have had the ability to produce a nuclear weapon; thereby providing more time for a peaceful resolution.[209] Additionally, Iraq completely denied any intention to create nuclear weapons, and "pointed to its ratification of, and adherence to, the NPT as vindication from any wrong . . . ."[210] Almost every state rejected any notion that the reactor was not solely for peaceful means.[211] In Security Council Resolution 487, the Security Council accepted Iraq's claims and acknowledged Iraq's right to establish programs of nuclear development for peaceful purposes consistent with the "objectives of preventing nuclear-weapons proliferation."[212]

Security Council Resolution 487 determined that Iraq did not pose a threat to Israel, but it clearly did not deny a right of anticipatory self-defense. Because the discussions did not fully evaluate the legality of a right of anticipatory self-defense, and differed on both the meaning of anticipatory self-defense and the acceptance of a right of anticipatory self-defense, Security Council Resolution 487 does not oppose or support the existence of a rule of customary international law right of anticipatory self-defense.[213]

Philippines, U.N. Doc. S/PV.2284 *supra* note 203; United States and Mexico, U.N. Doc. S/PV.2288 *supra* note 203. *See also* ALEXANDROV, *supra* note 3, at 161 & nn.193-94.

[209] *See* MCCORMACK, *supra* note 77, at 104; ALEXANDROV, *supra* note 3, at 161-162. *But see* statement of Israeli representative, U.N. Doc. S/PV.2280 *supra* note 203 (claiming the nuclear reactor would be operational in a month and striking it after it became operational could cause mass casualties in Baghdad).

[210] MCCORMACK, *supra* note 77, at 58-59.

[211] *See* statements in U.N. Doc. S/PV.2280-2288 *supra* note 203.

[212] S.C. Res. 487, *supra* note 204.

[213] MCCORMACK, *supra* note 77, at 23-37.

International scholars debate the legality of Israel's strikes under a claim of anticipatory self-defense, although it was really a situation of preemptive self-defense because Israel struck before a threat could materialize, rather than before an imminent attack could occur. Some scholars state that Israel's attack was unlawful under the restrictive view because Iraq had not attacked Israel, and allowing for the expanded view of armed attack, no attack was imminent.[214] Several of these scholars, however, justify Israel's strikes on other grounds.[215] Other scholars argue the attack was justified under anticipatory self-defense.[216] Additionally, although Israel's attack was strongly condemned at the time, it is now widely thought to have slowed down Iraq's nuclear weapons research program, which Iraq denied existed.[217] In 1991, United Nations Special Committee (UNSCOM)[218] found specific evidence outlining an Iraqi nuclear weapons program as far back as 1980.[219]

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[214] *See* DINSTEIN, *supra* note 3, at 169; ALEXANDROV, *supra* note 3, at 161-63

[215] *See* DINSTEIN, *supra* note 3, at 169 (finding no right of anticipatory self-defense, but defending Israel's strikes as part of an on-going war with Iraq); ANTHONY D'AMATO, *Israel's Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT'L L. 584 (1983), *reprinted in Pre-emptive Strikes Against Nuclear Installations, in* INTERNATIONAL LAW AND POLITICAL REALITY 247, 251-257 (1995) (arguing Israel's strike was permissible because it did not violate Article 2(4) as it did not violate the territorial integrity or political independence of Iraq).

[216] Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 530 & n.217 (1999); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 17-18 (1999). "Scholars still debate the lawfulness of the Israeli action, though I believe that now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action." Reisman, *supra*, at 18. *See also* MCCORMACK, *supra* note 77, at 302 (arguing that Israel legally used the right of anticipatory self-defense in that it faced a clear threat, attempted peaceful solutions, and used force in a way to guarantee its own security with the minimum use of force and loss of life).

[217] *See* MCCORMACK, *supra* note 77, at 300; Reisman, *supra* note 216, at 18 & n.35.

[218] *See* S.C. Res. 687, U.N. SCOR, 46th Sess., U.N. Doc S/RES/687; U.N. SCOR, 46th Sess., U.N. Doc. S/22871/Rev.1 (1991).

[219] "First Report of the Sixth IAEA On Site Inspection in Iraq Under Security Council Resolution 687 (1991)", U.N. Doc. S/23122 (Oct. 8, 1991).

At the time of the attack, states did not accept Israel's actions as a lawful use of the right of self-defense as established under general principles of international law and Article 51. However, by stating Israel's strikes were not in self-defense because Iraq's reactor was clearly peaceful, several states leave open the question of whether the actions would have been legal they had known that Iraq intended to produce nuclear weapons.[220] During states' discussions in the Security Council, it was clear that most states' main concern was the possibility that Israel's strike would destabilize an already unstable situation in the Middle East. Because of the existing hostilities between Israel and Iraq, Israel could have diminished the argument that it was acting solely to preserve its dominance and strengthened its argument for self-defense if it had shared its intelligence with other countries and created a multilateral force, rather than acting unilaterally. The fact that Israel's strikes were limited to the Osirak facility and at a time to minimize casualties strengthens Israel's claim of self-defense. However, regardless of the strength of Israel's argument, Israel would still have faced intense international criticism because of the volatile situation in the Middle East.

C. 1986 U.S. Strike on Libya

Claiming self-defense in response to Libyan terrorist activities, the United States military struck five military targets in Libya on April 14, 1986.[221] Prior to the air strikes, several countries in addition to the United States asserted the Libyan government was

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[220] The states also claimed that Israel knew the reactor was peaceful, but attacked it to preserve Israel's dominance. *See* statements of League of Arab States, Pakistan, India, Bulgaria, U.N. SCOR, 36th Sess., 2281st mtg., U.N. Doc. S/PV.2281 (1981); Turkey, U.N. SCOR, 36th Sess., 2286th mtg., U.N. Doc. S/PV.2286 (1981). Bee see statement by

[221] Unless otherwise cited, the facts of the events leading to the 1986 air raid on Libya and the international response of the raid are taken from the following sources: Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987); Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177 (1987).

involved with many terrorist incidents from 1984 through early 1986.[222] In January 1986, in response to previous terrorist attacks by Libya, the United States attempted to pressure Libya into discontinuing its support of terrorists by imposing economic sanctions against Libya. Additionally, the United States asserted the right to enter the Gulf of Sidra by stationing warships in the gulf to conduct exercises. Libya claimed most of the Gulf of Sidra as part of its internal waters, thereby attempting to prevent foreign warships and military aircraft to enter without Libya's permission. Most countries, including the United States rejected Libya's claim. In March 1986, during the largest exercise, the Libyan military fired on American forces. The United States responded by destroying shore installations and sinking Libyan patrol boats.[223]

On April 5, 1986, terrorists bombed a crowded West Berlin discotheque heavily populated with American soldiers. Three people were killed, including two American soldiers and between 150 and 230 people were injured. After the bombing, the United States pressed for sanctions against Libya and looked for support from European countries for action against Libya. President Reagan threatened possible military strikes if evidence revealed that Libya was responsible for the attack.[224]

After the strikes, the United States informed the Security Council of its actions stating the United States exercised its inherent right of self-defense under Article 51 of the U.N.

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[222] The United States had evidence tying Libya to several terrorist attacks and attacks that had been prevented. The United Kingdom broke off diplomatic relations with Libya in 1984 because of an attack. Several other countries expelled Libyan diplomats based on alleged terrorist activities. In fact, the European Economic Community adopted limited sanctions against Libya. *See* Greenwood, *supra* note 211, at 933-34.

[223] *See* Greenwood, *supra* note 211, at 934-35; Intoccia, *supra* note 211, at 185.

[224] *See* Greenwood, *supra* note 211, at 935; Intoccia, *supra* note 211, at 183-85.

Charter in response to an on-going pattern of attacks by Libya on American nationals.[225] On April 15, the Security Council addressed the issue of the military strikes. Ambassador Vernon A. Walters, the United States Permanent Representative, stated the United States' actions were taken only after "other repeated and protracted efforts to deter Libya from its ongoing attacks against the United States in violation of the Charter."[226] The United States claimed the action was taken both in response to a pattern of terrorist acts against American nationals and to prevent future attacks, of which the United States had evidence of planning.[227] Ambassador Walters detailed the evidence tying the Libyan government to the most recent terrorist bombing of 5 April 1986.[228] Ambassador Walters also detailed other evidence of the Libyan government's ties to specific past terrorist activities and plans for several future attacks.

In essence, the United States argued that Americans and American assets were the subject of continuing armed attacks and that the United States obtained evidence of future

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[225] Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612, 632 (1986).

[226] *Id.* at 633, citing Statement by Ambassador Vernon A. Walters, the United States Permanent Representative, to the Security Council on April 15, 1986, USUN Press Release 29 (86), Apr. 15, 1986, UN Doc. S/PV.2674 (1986).

[227] "In the light of that reprehensible act of violence [the 5 April discotheque bombing] – only the latest in an ongoing pattern of attacks by Libya – and of clear evidence that Libya was planning a multitude of future attacks, the United States was compelled to exercise its right of self-defense. The United States hopes that this action will discourage Libyan terrorist acts in the future." *Id.* at 634, citing Statement by Ambassador Vernon A. Walters, the United States Permanent Representative, to the Security Council on April 15, 1986, USUN Press Release 29 (86), Apr. 15, 1986, U.N. Doc. S/PV.2674 (1986).

[228] On April 15, 1986, Ambassador Walters did not reveal the specifics about the evidence tying Libya to the discotheque bombing, which caused some states to be critical of the U.S. case against Libya. Jack M. Beard, *Military Action Against Terrorists Under International Law: America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 575-6 & n.60 (2002). However, eleven years later, U.S. released intercepted transcripts to be used as evidence in trial in the Berlin Chamber Court against people employed by or affiliated with the Libyan embassy in East Berlin. Four people were convicted of the bombing. *Id.* at 561 n.4.

attacks, both of which allow the United States to act preemptively in self-defense. The United States' strikes received overwhelming national support,[229] however, the international community responded immediately and many states criticized the strikes.[230] Although a Security Council resolution condemning the United States' strikes was vetoed, several states voted in favor of the resolution condemning the actions as a violation of the U.N. Charter and the norms of international conduct.[231] The General Assembly, by a vote of seventy-nine to twenty-eight, with thirty-three abstentions, adopted a resolution condemning the United States' strikes as a violation of the U.N. Charter and of international law.[232] The states that condemned the United States' actions argued that Libya had not committed an act of aggression; therefore, the United States did not have the right to act in self-defense. Additionally, the United States "failed to exhaust peaceful means and did not submit to the Security Council its disputes with Libya."[233] Even the states that were more supportive of the United States' actions encouraged the United States to attempt to resolve the conflict peacefully and to limit any self-defense strikes to terrorist facilities.[234] The United Kingdom

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[229] *See* MCCORMACK, *supra* note 77, at 237 & n.93.

[230] *Id.* at 230.

[231] Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates drafted a Security Council resolution condemning the strikes. Nine countries voted in favor of the resolution, including China and the Soviet Union. Five countries voted against the resolution, including the United States, Great Britain, and France. *See* Intoccia, *supra* note 211, at 189.

[232] G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/Res/41/53 (1986) *at* http://www.un.org/documents/ga/res/41/a41r038.htm.

[233] ALEXANDROV, *supra* note 3, at 185.

[234] MCCORMACK, *supra* note 77, at 233-34.

acknowledged a right to use force in response to terrorist attacks and to discourage future terrorist attacks.[235]

This situation was the first time that the United States invoked the right of self-defense under Article 51 to respond to terrorist attacks and prevent future ones, without also justifying the strikes under some other authorization.[236] Most of the international community disagreed with the United States' actions, claiming that an armed attack against the United States had not occurred; however the right of anticipatory self-defense was not addressed by many states.

D. 1994 U.S. Threat to Strike North Korea – Yongbyon Nuclear Facility

In 1994, the United States advanced the right of anticipatory self-defense, in this case extending the right to preemptive self-defense against North Korea's growing nuclear capability.[237] North Korea was a signatory to the Non-proliferation Treaty (NPT)[238] and argued with the International Atomic Energy Agency (IAEA) over inspections of the North Korean nuclear sites during the upcoming reprocessing of fuel rods from its nuclear plant. After North Korea ordered the inspectors out of the nuclear facility, the United States, Japan, and South Korea demanded North Korea to stop its nuclear program or face economic sanctions.[239] North Korea responded by threatening to attack South Korea.

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[235] *See* MCCORMACK, *supra* note 77, at 233-34; GRAY, *supra* note 3, at 117.

[236] *See* MCCORMACK, *supra* note 77, at 235-36. *See also* Lou Cannon & Bob Woodward, *Reagan's Use of Force Marks Turning Point: More Terror and Retaliation Seen*, WASH. POST, Apr. 16, 1986, at A1 ("Monday's military strike against Libya marked a turning point in administration policy after five years of internal debate about how to respond to international terrorism.")

[237] *See*, for an in-depth description of the circumstances surrounding this incident, ASHTON B. CARTER & WILLIAM J. PERRY, PREVENTIVE DEFENSE: A NEW SECURITY STRATEGY FOR AMERICA 123-132 (1999).

[238] *See supra* note 198.

[239] *Id.* at 129.

The situation escalated to the point that Secretary of Defense William J. Perry asked the military to create a plan for a preemptive strike.[240] The plan was designed to be implemented within a few days from implementation, and to entail a low risk of both American and North Korean casualties. Just as President Clinton was about to decide whether to increase the number of U.S. forces in South Korea, former President Jimmy Carter informed him that the North Koreans were willing to negotiate.

The threat of preemptive military force in self-defense led to North Korea signing the 1994 Agreed Framework accord.[241] The Accord provided for the North Koreans to dismantle their nuclear program, and, in return, the United States, Japan, and South Korea would help build other power-generating reactors in North Korea that would not produce weapons-grade plutonium.[242] There were no Security Council or General Assembly resolutions concerning the U.S.'s threat to use force to prevent North Korea from creating nuclear weapons, possibly because North Korea did not protest the situation; however, no states argued against the right to threaten to use force.[243]

While the lack of condemnation can be used to argue for an acceptance of the right of preemptive self-defense, more likely, this situation simply reveals that states do not protest the threat, as opposed to the use, of force in self-defense, although even the threat to use force is prohibited under Article 2(4). Although this incident occurred after the Cold War, based on the review of the previous situations, the international community probably would

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[240] CARTER & PERRY, *supra* note 222, at 128.

[241] *See* KAPLAN & KRISTOL, *supra* note 183, at 87 (2003); Lieber & Lieber, *supra* note 28, at 32, 33.

[242] CARTER & PERRY, *supra* note 222, at 132.

[243] *See* U.N. SCOR, 49th Sess., 3451st mtg., U.N. Doc. S/PV.3451 (supporting the Agreed Framework).

have demanded that the United States bring the issue to the Security Council for possible resolution prior to the use of force in preemptive self-defense. If the Security Council were unable to resolve the situation, the United States could have acted in self-defense, claiming it exhausted peaceful solutions; however the United States would have had to show some type of hostile intent.

E. 1998 U.S. Strikes on Afghanistan and Sudan

The decision of the United States in 1986 to use unilateral anticipatory self-defense against terrorist organizations was tested again in 1998, this time with a different response by the international community. On August 7, 1998, the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed. Hundreds were killed, including twelve Americans, and thousands were injured. U.S. intelligence pointed to Usama Bin Laden, the leader of Al-Qaeda, a fundamentalist Islamic terrorist network, and who had called for war against all Americans throughout the world. On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles at bin Laden's terrorist training camp in Afghanistan and a pharmaceutical plant in Sudan that evidence indicated was a chemical weapons facility financed by bin Laden.[244]

After the attacks, President Clinton addressed the nation and stated that the United States acted in self-defense against bin Laden because (1) bin Laden's terrorist group was responsible for the bombing of the embassies; (2) his terrorist group had attacked Americans

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[244] The facts and circumstances of this case study are derived from the following sources, unless otherwise cited. *See* Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. Int'l L.J. 207, 219-23 (2001) (note that Hendrickson says the U.S. strikes happened on 21 August); Michael C. Bonafede, Note: *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 178-81 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 161-67 (1999).

abroad on other occasions; (3) the United States had evidence that future attacks were planned; and (4) bin Laden was trying to acquire weapons of mass destruction.[245]

As part of the address, President Clinton stated that the United States took this action after much consideration. "Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens." [246] On August 20, 1998, the U.S. Ambassador to the United Nations, Bill Richardson, presented a letter to the United Nations stating the United States acted in self-defense when it struck the sites in Afghanistan and Sudan.[247] He stated the United States had repeatedly tried to "convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist organizations down and to cease their cooperation with the Bin Ladin [sic] organization."[248]

Although the international response to the United State's strikes was mixed, the majority of the states did not condemn the actions.[249] Many countries, including Germany, Australia, France, Japan, the United Kingdom, and Israel, expressed a general acceptance of the American strikes.[250] Other countries, including Sudan, Afghanistan, Iraq, Iran, Libya, Pakistan, and Russia condemned the strikes. However, scholars do note that the disapproval

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[245] *See* Murphy, *supra* note 227, at 162.

[246] *Id.* citing President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1643 (Aug. 20, 1998).

[247] *Id.* at 162 citing Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (1998).

[248] *Id.*

[249] *See* Beard, *supra* note 228, at 563-4 & n.14-17.

[250] *SeeWilliam* Drozdiak, *European Allies Back U.S. Strikes: Japan Says It "Understands,"* WASH. POST, Aug. 21, 1998, at A20 (stating that several states agreed the United States' actions were justified under international law as a legitimate response to international terrorism).

focused mainly on the attack of the pharmaceutical plant in Sudan, and overall, was not very strong.[251] Egypt did not discuss the American strikes, but issued a statement urging the Security Council "to take the appropriate decisions against terrorism . . . and those countries which extend to terrorist elements the assistance they need."[252]

Neither the General Assembly nor the Security Council condemned the attacks. In fact, when the Security Council discussed the Afghan civil war on August 28, 1998, little was said about the American strikes and the resulting resolution stated the Security Council was "deeply concerned 'at the continuing presence of terrorists in the territory of Afghanistan" and demanded that "the Afghan factions . . . refrain from harbouring [sic] and training terrorists and their organizations.'"[253]

Prior to responding to the terrorist attacks, the United States shared some of its evidence with several states, informed several states of the upcoming strikes, and then limited its strikes to terrorist facilities specifically tied to bin Laden. Contrary to the response after the 1986 Libyan strikes, these strikes were widely supported by the international community, which did not deny that terrorist strikes are armed attacks nor deny the right to act in self-defense against these attacks and to prevent future attacks. The main argument against the American strikes was limited to a disagreement about the evidence that the pharmaceutical plant in Sudan was being used by bin Laden. The international community

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[251] "Although all members of the [Arab] League voted unanimously against the United States, when speaking alone, many of these states were considerably more reserved in their anti-American positions." Leading Middle Eastern countries such as Egypt and Saudi Arabia did not take "harsh anti-American positions." Hendrickson, *supra* note 227, at 221. "The Secretariat of the League of Arab States condemned the attack on Sudan as a violation of international law, but was silent as to the attack on Afghanistan." Murphy, *supra* note 227, at 164-65.

[252] Howard Schneider, *Radical States Assail Act; Allies Muted*, WASH. POST, Aug. 22, 1998, at A20.

[253] Murphy, *supra* note 227, at 165 & n.21, citing S.C. Res. 1193 preamble and para. 15 (Aug. 28, 1998).

did not claim that the United States did not exhaust peaceful avenues, possibly because the United States for years had urged Afghanistan and Sudan to discontinue supporting terrorists. This situation evidences both the continuation of the United States' assertion that anticipatory self-defense is legal under international law and the evolution of the international community's acceptance of this right.

F. 1999 NATO Intervention in Kosovo

Although the 1999 NATO air strikes against the Federal Republic of Yugoslavia are termed a humanitarian intervention, not self-defense, the air strikes were conducted as a preventive measure against future genocide. President Clinton explained, "We act to prevent a wider war, a war we would be forced to confront later – only at far greater risk and greater cost."[254] The legality of humanitarian intervention without Security Council approval is a hotly debated topic,[255] and will not be addressed in this paper, but the international communities' response to the anticipatory aspect of the action will be addressed.

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[254] Dowd, *supra* note 4.

[255] For a thorough evaluation of the legality of humanitarian intervention, see SIMON CHESTERMAN, JUST WAR OR JUST PEACE? (2001); MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 28-29 (2001). *See also* Leslie A. Burton, *Kosovo: To Bomb or Not to Bomb? The Legality is the Question*, 7 ANN. SURV. INT'L & COMP. L. 49 (2001) (Burton posits that NATO's actions were not legal under the U.N. Charter to maintain peace or in self-defense, but rather is morally and legally justified under customary international law to protect people from genocide and other human rights abuses. However, she asserts to ensure states do not abuse this basis for intervention, specific criteria, and she provides suggestions, should be established.); Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo,* 93 AM. J. INT'L L. 834 (1999) (Charney contends that NATO's intervention in Kosovo violated the U.N. Charter and international law. He argues that the possibility of an emerging right of humanitarian intervention, without specific rules and procedures limiting it, creates a dangerous situation in international law. He states the international community needs a new rule of law to allow for intervention to prevent human rights violations, while "limiting the risks of abuse and escalation" of an unlimited intervention. In this article, Charney recommends some requirements that could assist in developing a new rule of law.); Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824 (1999) (Henkin argues that the NATO action in Kosovo was illegal because it did not have the approval of the Security Council, but the facts of the intervention and the Security Council's decision not to stop NATO's intervention reveal a gap in international law and problems with the practice of the UN that must be addressed. He recommends either changes to the U.N. Charter, or a "gentleman's agreement," that would

In 1998, the conflict in Kosovo between Albanian guerillas (Kosovo Liberation Army, KLA) and the Serb-led Government of the Federal Republic of Yugoslavia (FRY) reached such a serious level[256] that the Security Council issued a resolution stating the situation was a threat to the peace and security in the region and demanded that the parties cease the conflict immediately. The violence did not end and several countries called for air strikes against the FRY.

When Russia stated it would veto any Security Council resolution for air strikes, NATO addressed the issue. NATO initiated negotiations with Milosevic, but they proved unsuccessful.[257] The North Atlantic Council (NAC) then authorized limited air strikes against the FRY. On the same day in October 1998, Milosevic agreed to comply with the Security Council resolution and signed several agreements endorsed by the Security Council.[258] Milosevic did not fully comply with the agreements within the deadline, but NATO stated he "substantially complied" so they extended the deadline indefinitely, "thereby technically leaving the NATO activation order in place, but suspended."[259] By

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allow for the Security Council to vote on actions by a regional organization, but make the vote not subject to the veto.); Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia,* 93 AM. J. INT'L L. 828 (1999) (Wedgwood states that although there was much support for the intervention by NATO, the legality of the action is uncertain. She postulates that the Kosovo intervention, following on the heels of Rwanda and Bosnia, may "mark the emergence of a limited and conditional right of humanitarian intervention.").

[256] The facts of the Kosovo conflict are taken from the following source, unless otherwise cited, which includes a brief, but thorough, description of the conflict, see Murphy, *supra* note 227, at 167-170. For a comprehensive discussion of the actions taken before and during the Kosovo campaign, including positions and statements made by various countries, see CHESTERMAN, *supra* note 236, at 206-18.

[257] *See* Burton, *supra* note 236, at 49.

[258] Murphy, *supra* note 227, at 169-70.

[259] *Id.* at 170.

March of the following year, the situation deteriorated and NATO determined that force was the only option.[260]

In March 1999, the U.S. and other NATO countries initiated a bombing campaign against Milosevic. Part of the justification for the attacks was based on the need to engage in a preventive war to prevent further atrocities. President Clinton stated:

> In Bosnia we had the UN in there first in a peace-keeping mission, and we tried for four years, you know, 50 different diplomatic solutions, all those different maps, all that different arguments, and at the end of it all, from 1991 to 1995, we still had Srebrenica. ... When it was all said and done, we had a quarter of a million people dead and two and a half million refugees. And I think what you have to understand is that we saw this through the lens of Bosnia. And we said we are not going to wait a day, not a day if we can stop it. ... Once we knew there was a military plan, they had all those soldiers deployed, they had all those tanks deployed, you know, we knew what was coming and we decided to move.[261]

UK Prime Minister Tony Blair also indicated that prevention of further atrocities was the main reason for NATO's actions.[262]

NATO countries argued several reasons why their intervention actions did not violate the U.N. Charter, mainly focusing on prior resolutions of the Security Council.[263] In statements to the Foreign Affairs Committee of the British House of Commons, the British Minister of State and the Foreign Secretary informed the Committee that states had the right

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[260] *See* Burton, *supra* note 236, at 49.

[261] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 879, 882-83 (1999), excerpting from the President's Remarks on Kosovo and National Issues, N.Y. TIMES, June 26, 1999, at A11.

[262] "We are taking this action for one very simple reason; to damage the Serb forces sufficiently to prevent Milosevic for continuing to perpetuate his vile oppression against innocent Kosovar Albanian civilians." *Text of British Prime Minister Tony Blair's Statement on Kosovo Bombing*, N.Y. TIMES, March 24, 1999.

[263] *See generally* GLENNON, supra note 255, at 28-29.

to use force in the case of "overwhelming humanitarian necessity where, in the light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe."[264] The NATO Secretary General stated that Yugoslavia repeatedly ignored several Security Council resolutions and that:

> [T]he U.N. Charter itself calls for action to be taken by the international community to respond to threats to peace and security, and in response to grave humanitarian emergencies . . . and . . . there is an ever-growing body of international law . . . that require the international community to respond when massive violations of human rights are being committed."[265]

The United States Secretary of State Madeleine Albright indicated that NATO's actions were justified because Yugoslavia had continued to violate Security Council resolutions and that "NATO's actions [were] justified and necessary to stop the violence."[266]

But other countries, specifically Russia and China, argued vehemently against any statement that NATO's actions were authorized under international law.[267] In addition to making several statements about the matter, both countries "repeated their objections in the United States Security Council."[268]

After an extensive review of the Kosovo situation, the Foreign Affairs Committee of the British House of Commons issued a comprehensive report concluding, "*Operation Allied*

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[264] House of Commons, Select Committee on Foreign Affairs, Fourth Report ¶ 124 (May 23, 2000), *at* http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm#a34 [hereinafter House of Commons] (last visited June 28, 2003).

[265] Lord Robertson, NATO Secretary General, Law, Morality, and the Use of Force, Address Before the Institut de Relations Internationales et Strategiques, Paris (May 16, 2000) *at* http://www.nato.int/docu/speech/2000/s000516a.htm.

[266] GLENNON, supra note 255, at 28, citing Madeleine Albright, U.S. Dept. of State Press Conference on "Kosovo" (March 25, 1999).

[267] GLENNON, *supra* note 255, at 28-29.

[268] GLENNON, *supra* note 255, at 29.

Force was contrary to the specific terms of what might be termed the basic law of the international community—the U.N. Charter, although this might have been avoided if the Allies had attempted to use the Uniting for Peace procedures."[269] Many international scholars have agreed that NATO's actions contradicted the requirements of the U.N. Charter.[270] However, the House of Commons concluded the actions were nevertheless legitimate, based on the specific circumstances. "We conclude that, faced with the threat of veto in the Security Council by Russia and China, the NATO allies did all that they could to make the military intervention in Kosovo as compliant with the tenets of international law as possible."[271]

During two Security Council meetings, several states discussed the legality of NATO's actions.[272] Although many states argued NATO acted illegally because it acted outside the Security Council, the majority of states argued the actions were legal.[273] These states claimed that not only did the Security Council resolutions state there was a threat to international peace and security, but also that NATO attempted to resolve the situation through the Security Council. Additionally, NATO only used force when it became clear that peaceful negotiations had broken down. In fact, when a resolution was proposed to end the actions by NATO, only four countries voted in favor, while twelve countries voted

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[269] House of Commons, *supra* note 245, at ¶ 128.

[270] International lawyers who argued that NATO actions were legal under international law, including Professors Christopher Greenwood and W. Michael Reisman, and those who argued they were illegal, including Professor Ian Brownlie, agreed NATO's actions did not abide by the language of the U.N. Charter. *See generally*, House of Commons, *supra* note 245, at ¶ 126.

[271] House of Commons, *supra* note 245, at ¶ 134.

[272] *See* U.N. SCOR, 54th Sess., 3988th-3989th mtgs., U.N. Doc. S/PV.3988-3989 (1999).

[273] Canada, Slovenia, Netherlands, United States, United Kingdom are just a few of the states that argued the actions were legal. *See id.*

against the resolution.[274] Although states did not specifically address the anticipatory aspect of the action, the international response reveals an acceptance of acting in anticipation of a catastrophe, as long as peaceful options were attempted and failed.

G. Post-September 2001 Attitudes Regarding State Response to Terrorism

1. After September 11, 2001

Prior to September 11, 2001, the international community acknowledged the right of anticipatory self-defense, but states argued over the specific application of this right. As shown in the state practices above, the more time passed after the Cold War, the more accepting states were of the right of anticipatory self-defense. Although states acknowledged the problem of terrorists, the Security Council refused to apply pressure, backed by a threat of force, to states to encourage them to stop supporting international terrorists within their borders. As discussed in Part III.A., some of this can be explained by the inability of the Security Council to act during the Cold War. But after the Cold War, the Security Council did not step forward to control these situations; instead individual states continued to respond. The terrorist strikes against the United States on September 11, 2001, changed the international community's response to terrorist actions.[275] In the months following the

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[274] *See* U.N. Doc. S/PV.3989, *supra* note 253.

[275] The terrorist activities of September 11, 2001 "shattered the world view and, quite possibly, the emotional foundation on which that sense of security rested." W. Michael Reisman, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833 (2001). "[T]he United States has been involved in the fight against terrorism for a long time, ... [b]ut September 11th clearly changed the landscape forever and . . . changed the public consciousness in the United States and around the world." Bill Clinton, I Met You Once Before in Oklahoma, Address to the Foreign Policy Association's World Leadership Forum (Sep. 20, 2001), *in* IX AND X FOREIGN POL'Y F. 7, 7-8 (2001). For a comprehensive view of action by the United Nations, see the specific website of the United Nations on UN Action Against Terrorism at http://www.un.org/terrorism/ (last visited July 19, 2003).

terrorist attacks of September 11, 2001, the international community banded together in a worldwide coalition for the war against terrorism.[276]

The Security Council and NATO acknowledged that threats to international peace and stability are very different now than when the organizations were established – after World War II, world leadership did not anticipate terrorists threats combined with attempts to obtain weapons of mass destruction. Immediately after the September 11, 2001 attacks, however, both the Security Council and NATO took action to address these threats.[277]

On September 12, 2001, the Security Council adopted resolution 1368 "recognizing the inherent right of individual or collective self-defense in accordance with the Charter"[278] and stating that the acts of September 11th, like all acts of international terrorism, are threats to international peace and security. In Security Council Resolution 1373 on September 28, 2001, the Security Council again recognized the inherent right of self-defense and stated that any act of international terrorism is a threat to international peace and security.[279] In this

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> 136 countries have offered a range of military assistance. . . . The U.S. has received 46 multilateral declarations of support from organizations. . . . The U.N. General Assembly and Security Council condemned the attacks on September 12. . . . NATO, OAS and ANZUS (Australia, New Zealand and the U.S.) quickly invoked their treaty obligations to support the United States. . . . 142 countries have issued orders freezing the assets of suspected terrorists and organizations. . . . 89 countries have granted over-flight authority for U.S. military aircraft. . . . 76 countries have granted landing rights for U.S. military aircraft. . . . 23 countries have agreed to host U.S. forces involved in offensive operations.

The Coalition Information Centers, *The Global War on Terrorism: The First 100 Days* at 8 (2001), *at* http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html.

277 Reisman, *supra* note 275, at 833.

278 S.C. Res 1368, U.N. SCOR, 56th Sess., at 1, U.N. Doc. S/RES/1368 (2001), *at* http://www.un.org/Depts/dhl/resguide/scact2001.htm.

279 S.C. Res 1373, U.N. SCOR, 56th Sess., para. 1(a), U.N. Doc. S/RES/1373 (2001), *at* http://www.un.org/Depts/dhl/resguide/scact2001.htm.

resolution, the Security Council took strong measures to combat terrorism including mandating that all states must "prevent and suppress financing of terrorist acts,"[280] "refrain from providing any form of support, active or passive to entities or persons involved in terrorist acts,"[281] and "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens."[282] In addition, Security Council Resolution 1373 established the Counter-Terrorism Committee to monitor the implementation of the resolution.[283]

NATO addressed the terrorist acts by issuing a press release on September 12, 2001, stating that if the September 11, 2001, attacks were from abroad, NATO would consider the attacks against the United States to be attacks against all members of NATO, thereby invoking Article 5 collective self-defense of the Washington Treaty.[284] NATO acknowledged that although the circumstances that led to the initial commitment of collective self-defense in NATO were very different than the security risks NATO countries face currently, the commitment is not less essential today because of the problem of international terrorism.[285] As early as 1999, the Heads of State and governments of NATO countries "condemned terrorism as a serious threat to peace and stability and reaffirmed their

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[280] *Id.*

[281] *Id.* at para 2(a).

[282] *Id.* at para 2(c).

[283] *Id.* at para 6.

[284] Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), *at* http://www.nato.int/docu/pr/2001/p01-124e.htm.

[285] *Id.*

determination to combat it in accordance with their commitments to one another, their international commitments and national legislation."[286]

In addition to the Security Council and NATO action, the European Union, along with its member states individually; U.S. Pacific allies such as Australia, New Zealand, Japan, and South Korea; and Arab states, including Bahrain, Egypt, Jordan, Pakistan, Saudi Arabia, and Kuwait, expressed support for the United States' action in Afghanistan against terrorism.[287]

The international community's extensive support for the military actions in Afghanistan provide resounding support for the United States' claim of the need to use force against terrorist organizations and states that support those organizations. This support seemed to indicate that the international community might be willing to support the National Security Strategy's claim to unilateral preemptive self-defense against these threats.

2. After Release of the National Security Strategy

After the enormous support for the United States' actions in Afghanistan, the United States published its National Security Strategy in September 2002 in which it stated that the international community must cooperate more, using non-force and force measures, to prevent threats from rogue states and terrorist organizations who attempt to obtain weapons of mass destruction.[288] Additionally, the United States argued for the right to extend unilateral anticipatory self-defense to include preemptive self-defense—acting to stop a threat from materializing, instead of waiting until the attack is about to happen. The claim of

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[286] *Id.*

[287] *See* Beard, *supra* note 228, at 567-70 (citations omitted).

[288] *See supra* Part I.B.

a right to use force in unilateral preemptive self-defense created immediate controversy in the international community, especially since it was published around the same timeframe that the United States' was arguing for the use of force against Iraq. Although some states support preemptive action and agree with the dangers posed by rogue states and terrorists that attempt to obtain weapons of mass destruction, states seem more concerned with the unilateral aspect of the National Security Strategy, rather than the preemptive aspect.[289] The acknowledgment of the need to take action against these threats combined with the dislike of the National Security Strategy's promotion of unilateral preemption as an option, may have led states to move forward in the fight against terrorism and the proliferation of weapons of mass destruction to include accepting the use of force as a possible option in the fight; but confined to multilateral uses, not unilateral. Since the publication of the National Security Strategy, the Security Council and the European Union have taken large steps forward in implementing multilateral non-force measures to combat the threat, and indicating an acceptance of multilateral forceful measures as a last option.

In a ministerial-level Security Council meeting on January 20, 2003, the Security Council returned to the issue of combating terrorism and unanimously adopted Security Council Resolution 1456.[290] In a statement to the January 20, 2003 Security Council ministerial meeting on terrorism, Secretary-General Kofi Annan affirmed that "[t]errorism is

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[289] *See* Glenn Frankel, *New U.S. Doctrine Worries Europeans*, WASH. POST, Sept. 30, 2002, at A1 (stating that Europeans are mainly concerned that the United States is embracing unilateralism and the use of force as a primary response, while moving away from multilateralism); Tom Allard, *US Need Not Go it Alone*, Sydney Morning Herald, Sept. 16, 2002, at 7 (supporting the United States doctrine of preemption, but preferring collective action over unilateral action).

[290] Press Release, U.N. SCOR, 86th Sess., 4688th mtg., U.N Doc. SC/7638 (2003) [hereinafter Press Release SC/7638], *at* http://www.un.org/News/Press/docs/2003/sc7638.doc.htm.

a menace that requires a global response. Since the terrorist attacks of September 11, 2001 on New York and Washington, the world has focused unprecedented attention on terrorism and on the means of countering it."[291] Secretary-General Kofi Annan also affirmed the importance of the work of the Counter-Terrorism Committee[292] --"Because of its responsibility in ensuring the implementation of international anti-terrorism conventions and standards, the Security Council's Counter-Terrorism Committee will continue to be at the center [sic] of global efforts to fight terrorism."[293] The resolution was an adoption of a declaration, thereby not mandating states to follow certain actions, but rather encouraging states to take certain action. The declaration acknowledged "there is a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and therefore a need to strengthen controls on these materials."[294]

Security Council Resolution 1456 pushes forward the cooperation of the international community in combating terrorism by declaring that "[a]ll States must take urgent action to prevent and suppress all active and passive support to terrorism, and in particular comply fully with all relevant resolutions of the Security Council, in particular resolutions 1373 (2001), 1390 (2002) and 1455 (2003)."[295] Even the United States believes that the international community is improving in its handling of these threats as evidenced by the

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[291] Statement of Secretary-General Kofi Annan to 20 January Security Council ministerial meeting on terrorism, U.N. SCOR, 86th Sess., U.N. Doc. SG/SM/8583 SC/7639 (Jan 20, 2003) [hereinafter SC/7639], http://www.un.org/News/Press/docs/2003/sgsm8583.doc.htm.

[292] S.C. Res. 1373, *supra* note 279.

[293] SC/7639, *supra* note 291.

[294] S.C. Res. 1456, U.N. SCOR, 86th Sess., U.N. Doc. S/RES/1456 (2003), *at* http://www.un.org/Depts/dhl/resguide/scact2003.htm.

[295] *Id.* at para. 1.

Secretary of State of the United States, Colin Powell's comments during the Security Council meeting:

> [t]he United Nations had long worked on the campaign against terrorism, through the adoption of 12 treaties and protocols, to which compliance by all States was vital. With the Council's adoption of resolution 1373 (2001), the United Nations fundamentally changed the way the international community responded to terrorism by creating an obligation for all Member States to work together to stop it.[296]

Although the Security Council itself has not yet specifically endorsed preemptive use of force against these threats, several states have, such as the United States, United Kingdom, and Australia,[297] and many other states are starting to. In the past, many European states balked at handling threats outside the European community.[298] However, this attitude is starting to change. "[In June 2003] EU foreign ministers agreed that the use of force to deal with weapons of mass destruction could be envisaged when diplomacy fails."[299] The European Council in June 2003 declared that the proliferation of weapons of mass destruction and the risk that terrorists might obtain them is a growing threat to international security and peace and the European Union must be willing to confront these threats.[300] The

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[296] *See also* U.N. SCOR, 58th Sess., 4688th mtg., U.N. Doc S/PV.4688 (2003), *at* http://www.un.org/Depts/dhl/resguide/scact2003.htm .

[297] *See supra* note 289.

[298] "One of the greatest weaknesses of European efforts to co-ordinate foreign and defence [sic] policies so far has been the reluctance of most governments to deal with potential threats beyond Europe's borders." William Wallace, *Hard Decisions are Needed to Defend Europe*, FIN. TIMES, June 27, 2003, at 19.

[299] *Making Up*, THE ECONOMIST, June 26, 2003, at 29.

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> The proliferation of weapons of mass destruction and means of delivery such as ballistic missiles is a growing threat to international peace and security. A number of states have sought or are seeking to develop such weapons. The risk that terrorists will acquire chemical, biological, radiological or nuclear materials adds a new dimension to this threat.

Council stated many tools with which to deal with this threat, acknowledging coercive means as one of the tools, albeit the last tool.[301]

The European Union continued to move forward with dealing with the threat of terrorists and the proliferation of weapons of mass destruction during the EU-US Summit in Washington D.C. on June 25, 2003, at which leaders of the European Union and the United States met to discuss several items, including weapons of mass destruction.[302] At this meeting, European Council President Konstandinos Simitis, European Commission President Romano Prodi, and U.S. President George W. Bush issued a joint statement that the proliferation of weapons of mass destruction "constitutes a major threat to international peace and security" and the threat "is compounded by the interest of terrorists in acquiring WMD. .

> . . . Meeting this challenge must be a central element in the EU external action, including the common foreign and security policy. Our objective is to deter, halt and, where possible, reverse proliferation programmes [sic] of concern worldwide.

Declaration on Non Proliferation of Weapons of Mass Destruction - Annex II, PRESIDENCY CONCLUSIONS, THESSALONIKI EUROPEAN COUNCIL 37, para 1 (June 19-20 2003) *at* http://ue.eu.int/newsroom/makeFrame.asp?MAX=&BID=76&DID=76279&LANG=2&File=/pressData/en/ec/76279.pdf&Picture=0 (last visited on July 19, 2003).

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> We have a wide range of instruments available: multilateral treaties and verification mechanisms; national and internationally-coordinated export controls; co-operative threat reduction programmes [sic]; political and economic levers; interdiction of illegal procurement activities; and, as a last resort, coercive measures in accordance with the U.N. Charter. While all are necessary, none is sufficient in itself. We need to strengthen them all, and deploy those which are most effective in each case.

Id. at 38.

[302] Press Release, European Union, EU-US Summit – Washington, 25 June 2003 (June 23, 2003), *at* http://europa.eu.int/comm/external_relations/us/sum06_03/press.htm (last visited July 19, 2003).

. . We pledge to use all means available to avert WMD proliferation and the calamities that would follow." [303]

Although it is clear that the international community is becoming more willing to use preemptive force to control rogue states and terrorists that attempt to obtain weapons of mass destruction, it is also clear that the international community must take more steps to fully incorporate this use of force, and its assertion is that the use of force will be multilateral at a minimum, and preferably through the Security Council, not unilaterally. This is confirmed by states' responses to the United States' claim for a need to use force against Iraq.

H. 2003 War in Iraq

Although the international community is moving toward acceptance of the use of force to control the threat of rogue states and terrorists that attempt to obtain weapons of mass destruction as explored in Part IV.G above, the 2003 War in Iraq reiterated the international community's desire that action not be taken unilaterally and that peaceful options be exhausted before using force. The main events leading to the 2003 War in Iraq began in 1990 when Iraq invaded Kuwait and then refused to withdraw in violation of several Security Council resolutions. [304] In 1991, Iraq agreed to a cease-fire after coalition forces led by the United States forcibly removed Iraqi troops from Kuwait. The terms of the cease-fire

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[303] Joint Statement by European Council President Konstandinos Simitis, European Commission President Romano Prodi and U.S. President George W. Bush on the Proliferation of Weapons of Mass Destruction, EU - US Summit, (June 25, 2003), *at* http://eurunion.org/partner/summit/summit0306/WMDStatement.htm (last visited on July 19, 2003).

[304] For a brief description of the situation with Iraq and Kuwait and the United Nations' continued attempts to ensure Iraq did not keep or obtain weapons of mass destruction, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law,* 96 AM. J. INT'L L. 956-959 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law,* 97 AM. J. INT'L L. 419, 419-432 (2003).

were included in Security Council Resolution 687.[305] This resolution, which acknowledged Iraq's continued violations of international law and treaties banning the use of or attempt to obtain weapons of mass destruction, required Iraqi to accept the destruction or removal of certain missiles and all weapons of mass destruction, including research or manufacturing facilities.[306]

The resolution additionally called for the establishment of a special commission to conduct on-site inspections of Iraq's capabilities and Iraq's destruction, or rendering harmless, of the illegal materials and facilities.[307] This commission, the U.N. Special Commission (UNSCOM),[308] worked in Iraq from 1991 to 1998 to search for and destroy, or observe the destruction of, Iraq's weapons of mass destruction. While the Commission's work was valuable, it continually faced Iraqi resistance, until 1998 when Iraq refused to cooperate further.[309]

In 1999 the Security Council replaced UNSCOM with United Nations Monitoring, Verification, and Inspection Committee (UNMOVIC).[310] UNMOVIC was to "establish a reinforced system of ongoing monitoring and verification, . . . address unresolved disarmament issues, . . . and . . . identify . . . additional sites in Iraq to be covered by the

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[305] S.C. Res. 687, *supra* note 218.

[306] *Id.* at para. 8.

[307] *Id.* at paras. 9, 12. (requiring in paragraph 12 that the special commission to assist the International Atomic Energy Agency with on-site inspections of Iraq's nuclear capabilities).

[308] S.C. Res. 699, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/699 (1991) *at* http://www.un.org/Docs/scres/1991/scres91.htm.

[309] *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 470, 473 (1999).

[310] S.C. Res. 1284, U.N. SCOR, 54th Sess., U.N. Doc. S/RES/1284 (1999) *at* http://www.un.org/Depts/dhl/resguide/scact1999.htm.

reinforced system of ongoing monitoring and verification."[311] However, it was not until months of negotiating between Iraq and UNMOVIC, accompanied by American pressure to enforce the previous resolutions that Iraq agreed to allow the inspectors to return without any limitations on UNMOVIC.[312]

Despite the seemingly cooperation of Iraq, the United States argued Iraq did not intend to fully comply with the resolutions, but rather "had been provided sufficient time to comply with the inspections regime and that it was now time to uphold prior Security Council resolutions by the use of military force."[313] In October 2002, the Bush administration obtained approval from the United States Congress to use of force against Iraq.[314] The United States continued to work through the Security Council to obtain authorization to use force.

The United States, with the support of a few other countries, wanted the Security Council to pass a resolution stating that Iraq would face military force if it failed to fully comply with the weapons inspections and previous resolutions.[315] Some members of the Security Council did not want to adopt a resolution that would allow a Member State to determine unilaterally that Iraq violated the resolution and therefore authorize military force. The United States argued that without a threat of possible force, the resolution would be ineffective. A compromise was reached in November 2002, in Resolution 1441, which stated

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[311] S.C. Res. 1284, *supra* note 310, at para. 2.

[312] *Letter Dated 16 September 2002 from the Secretary-General Addressed to the President of the Security Council*, attach., U.N. Doc. S/2002/1034 (2002). *See generally* Murphy 2002, *supra* note 304, at 957-959.

[313] Murphy 2002, *supra* note 304, at 959 & n.29.

[314] *Id.* at 959-60, 960 n.30.

[315] *Id.* at 960-61.

"Iraq has been and remains in material breach of its obligations . . .[and the Security Council provides] by this resolution, a final opportunity to comply with its disarmament obligations."[316] The resolution required Iraq to submit an accurate and complete report on its weapons of mass destruction programs, in addition to submitting to the UNMOVIC inspections without conditions. A failure to provide a full and accurate report would constitute a further material breach.[317]

After UNMOVIC Executive Chairman Hans Blix noted that Iraq's declaration of its weapons programs seemed to be missing information and possibly inaccurate in some areas, the United States began negotiating for another Security Council resolution and preparing to use military force.[318] Several states argued against a resolution authorizing force stating that because Iraq was substantially complying with the inspections, peaceful solutions were possible.[319] However, it was acknowledged that the Iraqi authorities had "begun to cooperate only because they face heavy outside pressure, including the indispensable build-up of military force by the United States, the United Kingdom, Australia and others, and the

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[316] *Id.* at 961 & 966 n.36, citing S.C. Res. 1441 (Nov. 8 2002).

[317] S.C. Res. 1441, U.N. SCOR, 57th Sess., para. 4, U.N. Doc. 1441 (2002).

[318] Murphy 2003, *supra* note 304, at 420. *See also* Condoleezza Rice, *Why We Know Iraq is Lying*, N.Y. TIMES, Jan. 23, 2003, at A25.

[319] France, Germany, and Russia support more time for inspections, adding that military force should be a last resort. Elaine Sciolino, *France and Germany Call for Long Inspections*, N.Y. TIMES, Feb. 25, 2003, at A14. *See also* Felicity Barringer & David E. Sanger, *U.S. and Allies Ask U.N. to Affirm Iraq Won't Disarm*, N.Y. TIMES, Feb. 25, 2003, at A1. In his statement to the Security Council, Hans Blix called for Iraq to do more to comply with Resolution 1441, but also acknowledged Iraq's compliance by destroying 34 Al Samoud 2 missiles. U.N. SCOR, 58th Sess., 4714th mtg. at 3-4, U.N. Doc S/PV.4714 (2003) *at* http://www.un.org/Depts/dhl/resguide/scact2003.htm.

willingness of the international community to back diplomacy with force if necessary."[320] Several other states argued in favor of the U.S. position for military force.[321]

When it became clear the Security Council would not support another resolution specifically authorizing military force against Iraq, the United States and allied countries claimed that Iraq was in violation of Resolutions 678 and 687, which already authorized use of force to rid Iraq of weapons of mass destruction.[322] On March 17, 2003, President Bush gave Hussein forty-eight hours to leave the country or face military conflict.[323] On March 20, the United States and allied countries began the military conflict with Iraq.[324] This action was condemned by some states and supported by many others.[325]

These case studies reveal that following the end of the Cold War, the United States decided to address terrorist threats by using force in anticipatory self-defense. While states are willing to accept a need for anticipatory self-defense when the threat is imminent, the international outcry concerning the unilateral aspect of the National Security Strategy and the

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[320] *See* statement by Canada, U.N. SCOR, 58th Sess., 4717th mtg. at 19, U.N. Doc S/PV.4717 (2003), *at* http://www.un.org/Depts/dhl/resguide/scact2003.htm.

[321] The prime ministers of Spain, Portugal, Italy, the U.K., Hungary, Poland and Denmark, and the Czech president submitted an article to U.S. and European newspapers agreeing with the United States that Saddam Hussein continued to defy Security Council Resolutions; therefore the Security Council must enforce the resolution. Jose Maria Aznar et al., *United We Stand*, WALL ST. J., Jan. 30, 2003, at A14.

[322] Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338, 339 (Mar. 17, 2003).

[323] *Id.*

[324] Murphy 2003, *supra* note 304, at 425.

[325] *See* Condoleezza Rice, *Our Coalition*, Wall St. J., Mar. 26, 2003, at A12; *World Leaders Express Applause, Regret and Anger*, N.Y. TIMES, Mar. 20, 2003. *See also* U.N. SCOR, 58th Sess., 4721st mtg., U.N. Doc S/PV. 4721 (2003), *at* http://www.un.org/Depts/dhl/resguide/scact2003.htm.

concern the United States intended to unilaterally use force against Iraq,[326] reveals that the international community does not support unilateral preemptive action.

V. Reconciling The Right Of Self-Defense And State Practice With Future Needs

The National Security Strategy argues that the accepted right of anticipatory self-defense must be extended to allow for preemptive self-defense. As explained below, the international community, however, is not willing to accept an expanded right of self-defense against the possibility of future threats when this action is taken unilaterally.

Contrary to some observer's beliefs that preemptive self-defense is legal because the U.N. Charter framework is outdated or defunct, the U.N. Charter is a fluid document that adapts to today's threats to international peace and security. However, the United States' announcement of a right to unilateral preemptive strikes combined with unprecedented terrorist threats around the world threaten to upset the balance of international law and politics unless international authorities are willing to step forward to counter these threats and provide guidance on when the Security Council should use force multilaterally under Chapter VII.

A. The U.N. Charter is Not Dead

Several scholars argue that preemptive self-defense is legal because there is no longer a prohibition against the use of force[327]—but this is a flawed conclusion. These scholars

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[326] *See* Frankel, *supra* note 289.

[327] Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 Washington Quarterly 89 (2003), also citing A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II at 315 (1997); Michael J. Glennon, *The Fog of Law: Self Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002).

assert that the state practices reviewed in Part IV and many other violations of the prohibition against use of force since the inception of the U.N. Charter indicate the U.N. Charter has only been observed in the breach; therefore it no longer reflects existing international law.[328] Additionally, these scholars argue that uses of force that seem to be accepted by the international community, such as using force to prevent future terrorist actions and to prevent humanitarian crisis violate the original intent of the U.N. Charter. Based on states' actions, these scholars claim it is hard to "fashion a customary rule of nonintervention from all these practices that are inconsistent with such a rule."[329] Therefore, since state practice has negated the customary international prohibition against use of force, it has also negated the prohibition in the U.N. Charter.[330]

If the U.N. Charter framework were dead, unilateral preemptive self-defense would be legal as there would be nothing prohibiting it.[331] However, this entire argument is not valid for two reasons. First, it completely discounts two main facts. As revealed in the state practices covered above, when states use force they claim that their actions are consistent with the accepted right of self-defense or other legal justifications under the U.N. Charter.[332] These claims may not always be factually correct, but it is clear that states do not argue for a

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[328] Arend, *supra* note 327, at 100; Glennon, *supra* note 327, at 540.

[329] GLENNON, *supra* note 255, at 69.

[330] Arend, *supra* note 327, at 100.

[331] Arend argues that under the *Lotus* case from the Permanent Court of Justice, states can act as they choose unless they consent to limitations. The ambiguities of the U.N. Charter do not expressly restrict the right of preemptive self-defense and state actions do not reveal consent from states to limit this right. *See* Arend, *supra* note 327, at 93. *See also* DINSTEIN, *supra* note 3, at 145 (stating that "if international law does not prohibit a certain conduct, that conduct is lawful").

[332] *See supra* Part IV. *See also* GRAY, *supra* note 3, at 18.

new right to use force outside the U.N. Charter or that the U.N. Charter does not apply.[333] Additionally, when states analyze claims of a right to use of force, they evaluate the use by applying the standards established by the U.N. Charter and the *Caroline* limitations on the right to use force in self-defense.[334]

Second, the U.N. Charter can adapt to address new circumstances states face today, such as humanitarian crisis and the proliferation of weapons of mass destruction. The I.C.J. in *Nicaragua* stated that customary international law affects the interpretation of the U.N. Charter; thereby allowing the U.N. Charter framework to evolve with state practice and handle new crises.[335] As states, and preferably, the Security Council, use force, or the threat of force, to control these threats, the U.N. Charter framework on the right of states to use self-defense and the right of the Security Council to authorize the use of force will expand to adequately address current threats to the international peace and security and to provide guidelines on this use of self-defense. These two lines of analysis refute scholars' attempts to argue that the U.N. Charter is dead or ceases to provide limits to the right of self-defense. In fact, the fact the United States and other states took the recent dispute with Iraq to the Security Council reinforces the U.N. Charter's continued existence and viability.

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[333] The I.C.J. addressed this issue in *Nicaragua*:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . . If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

[334] *See supra* Part IV.

[335] *See Nicaragua*, 1986 I.C.J. at 94.

B. State Practice: No Right to Unilateral Preemptive Self-Defense

As examined in Part III, when the international community created the United Nations, the goal was to promote international peace and security by prohibiting the use of force except force authorized by the Security Council under Chapter VII or force authorized as self-defense under Article 51. As also discussed in Part III, the Security Council refused to act to maintain international peace and security, necessitating states to act in self-defense, sometimes claiming the right of anticipatory or preemptive self-defense.[336] These actions were met with a mixed response by other states revealing several factors about the use of anticipatory and preemptive self-defense.

In all three situations during the Cold War, the international community was hesitant to accept anticipatory or preemptive self-defense for fear of escalating the global nuclear tension or the destabilizing the Middle East. Instead, most states shied away from discussing the limits of self-defense, and when they did acknowledge a right of anticipatory or preemptive self-defense, the states either refused to accept that a credible threat existed, as in the 1962 Cuban embargo and the 1981 Osirak strike, or stated that peaceful measures were not exhausted, as in the 1981 Osirak strike and the 1986 Libyan strike.[337]

After the Cold War, the Security Council did respond more often to address issues of international peace and security, but political and economic issues still prevented the Security Council from taking action in several situations, such as the 1999 Kosovo intervention.[338] After the Cold War, the threat of global nuclear war receded and the United States emerged

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[336] *See* DINSTEIN, *supra* note 3, at 284; Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, at 24.

[337] *See supra* Parts IV.A., B., C.

[338] *See supra* Part IV.F.

as the main global superpower. In the 1994 North Korean situation and the 1998 Afghanistan and Sudan strikes, the United States acted in self-defense without first bringing the situation to the attention of the Security Council.[339] The international community accepted both situations as legal, probably because the 1994 North Korean situation was resolved peacefully and in the 1998 Afghanistan and Sudan strikes, the international community accepted the limited use of force in response to terrorist strikes and to prevent future strikes based on credible information. Additionally, the 1999 Kosovo intervention was accepted as legitimate because of a credible threat of mass casualties, the Security Council was unwilling to act, extensive peaceful negotiations were attempted but failed, and the action was a multilateral action. The international community's response in all of these situations evidences the acceptance of a right of anticipatory self-defense when a credible, imminent threat exists and peaceful options have been exhausted.

One international scholar, Christine Gray, argues that states do not fully believe a right of anticipatory self-defense exists because the official justification for the action was not based solely on the right of anticipatory self-defense.[340] In the 1962 Cuban embargo, the 1986 Libya strikes, and the 1998 Afghanistan and Sudan strikes, the state claiming a right to use self-defense either did not argue a right of anticipatory self-defense, or argued other legal reasons for self-defense in addition to the right of anticipatory self-defense.[341] Of the state practices reviewed, only in the 1981 Osirak and 1994 North Korea incidents did a state claim

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[339] *See supra* Part IV.D., E.

[340] *See* GRAY, *supra* note 3, at 112.

[341] *See supra* Parts IV.A, C., E.

it was acting solely in anticipatory or preemptive self-defense.[342] A more plausible explanation than that posed by Gray is that states advance every legal reason that provides a right to legitimately use force, rather than rely solely on one justification. This explanation is enforced by the fact that in the state practices reviewed, most states accepted the right to use anticipatory self-defense, as long as the requirements of necessity and proportionality were met.

Through all of these state practices, neither the Security Council, nor any other international organization, specifically detailed the limits surrounding the right to use anticipatory or preemptive self-defense. In fact, the 1962 Cuban embargo, the 1981 Osirak strike, and the 1994 North Korean situation all expanded anticipatory self-defense, response to an imminent attack, to include preemptive self-defense, response to an emerging threat that could be used to attack. Although the use of preemptive self-defense in the first two situations was initially rejected, they were during the Cold War and many scholars argue now that the 1981 Osirak strike were legal because evidence now reveals a credible threat existed and the strikes were limited to the threat.[343] This seeming acceptance of the use of preemptive self-defense was further encouraged by states' acceptance of the United States' call for the use of force to fight a war against terrorism after the September 11, 2001 attacks. In this accepting atmosphere, the United States' pushed forward and published the National Security Strategy arguing for a right to unilateral preemptive self-defense. The international

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[342] *See supra* Parts IV.B., D.

[343] *See supra* notes 216-19 and accompanying text.

community immediately responded against this argument fearing that the United States' was moving both away from multilateralism and toward a preference for use of force.[344]

The international community's response after the publication of the National Security Strategy strongly argues against a right of unilateral preemptive self-defense. This is supported by the fact that although the United States' indicated the situation in Iraq would be a good test case for the use of preemptive self-defense, the justification used for the 2003 War in Iraq was a violation of Security Council resolutions.[345] The right of preemptive self-defense was not even raised as a secondary authority for the use of force.

Although the international community has not provided specific guidelines for the accepted use of anticipatory self-defense, the discussions in the Security Council concerning the reviewed state practices reveal several factors in evaluating a claim of anticipatory self-defense. If a state believes it is facing a serious threat, it must first exhaust all peaceful solutions as time allows, including bringing the conflict before the Security Council. If the Security Council is unable to resolve the situation, the state should attempt to gain multilateral support for the use of self-defense. As a last resort, the state may unilaterally use force in self-defense, but faces criticism or condemnation by the Security Council if it cannot show an imminent, credible threat with exhaustion of all reasonable peaceful solutions before use of force, proportionality of the force used compared with the threat faced. If the use of force is limited to precision strikes, such as in the 1981 Osirak strike and the 1998 Afghanistan and Sudan strikes, the international community is more willing to accept a claim of self-defense. However, if the use of force is much larger and the threat is not imminent,

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[344] *See* Frankel, *supra* note 289.

[345] *See* Murphy 2003, *supra* note 304, at 427 & n.61.

such as the 2003 War on Iraq, the international community rejects a right to use force in self-defense while peaceful options are available.

Although the international community rejects a unilateral right of preemptive self-defense, the international community is in a precarious situation because of the lack of specific guidance on the accepted right of anticipatory self-defense combined with the acknowledgment that a threat to international peace and security exists from rogue states and terrorists that attempt to obtain weapons of mass destruction. Unless the international community, through the Security Council, is willing to address these threats and provide guidelines for the use of force, individual states may use force and then argue for a right of anticipatory self-defense by stretching the definition of imminent to include authority for preemptive action.

C. Willingness of the Security Council to Control Current Threats Under Chapter VII

As mentioned in Parts III.A and IV.G, the end of the Cold War and the recent actions of the international community indicate that it may be more willing to claim that rogue states and terrorists who attempt to obtain or use weapons of mass destruction are threats to international peace and security. This would authorize the Security Council to take action, including the use of force under Chapter VII. If the Security Council is willing to authorize the use of force to address these threats under specific guidelines, states will not be able to legitimately argue for the need for preemptive self-defense and rogue states and terrorists will be put on notice that attempts to obtain weapons of mass destruction will result in action by the Security Council. However, action by the Security Council can also lead to many

problems, such as those experienced in the struggle to address the need for and limits of humanitarian interventions.[346] To maintain the legitimacy of its actions and to ensure that the international community is clear on what situations may require the use of force, the Security Council must create some standards to apply to these future actions.

An important limitation on the Security Council is determining what actions by rogue states or terrorist organizations constitute a threat to peace, thereby authorizing the Security Council to act under Chapter VII. If the Security Council expands the definition too far, states will argue the Security Council is acting outside the mandate of the U.N. Charter.[347] Additionally, unless the Security Council or other regional organizations are willing to ensure protection and energy sources for less powerful states, those states may see Security Council action to prevent proliferation of nuclear weapons or nuclear capability as a way for the stronger states to dominate the weaker states. Another problem with expanding the definition of what constitutes a threat to the peace is that states may then use that to justify unilateral action when the Security Council is unwilling to act.[348]

As in the past, there will be times that the Security Council is unable to act against a credible threat. Other multilateral options exist such as action by the General Assembly or collective defense organizations such as NATO. Under the Uniting for Peace resolution, the General Assembly may recommend solutions to maintain the international peace and

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[346] *See* MURPHY, *supra* note 92, at 283-94, 297-321; CHESTERMAN, *supra* note 255; GLENNON, *supra* note 255. *See also supra* note 255.

[347] *See* MURPHY, *supra* note 92, at 293-94.

[348] *Id.* at 294.

security.[349] However, the General Assembly "may recommend the use of armed force only in cases where there is 'a breach of the peace or act of aggression.'"[350] If a situation is simply a threat to the peace, then the General Assembly does not have authorization to make recommendations. Additionally, Sean Murphy, a noted international scholar and professor, argues that a recommendation from the General Assembly alone, absent action by the Security Council, would not be sufficient authorization for states to use force.[351]

If the Security Council is unwilling to act and the evidence reveals a credible threat exists, the 1999 Kosovo intervention indicates that action by regional organizations may be accepted as legitimate as long as peaceful options are exhausted.[352] As a last resort, if a state strongly believes it has credible evidence of a threat and has exhausted peaceful options, it will probably use unilateral force in self-defense and argue to the international community that an exception to the denial of a right of preemptive self-defense should be made based on the unique circumstances of that particular case.

D. Guiding Principles for the Use of Force

The National Security Strategy and the international community argue that states must cooperate to reduce the conditions leading to rogue states and terrorist organizations and cooperate in non-force measures to eliminate the ability of rogue states terrorist organizations to obtain weapons of mass destruction. However, past experiences indicate the high probability that situations will soon arise in which a state argues for the need to use

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[349] *See supra* notes 103-06 and accompanying text.

[350] MURPHY, *supra* note 92, at 300.

[351] *Id.* at 300.

[352] *See supra* Part IV.F.

force to address these threats. The international community must create criteria, or at least guiding principles,[353] governing this use of force by the Security Council. The international community has struggled for years to agree on a general convention against terrorism and instead has settled on conventions against specific crimes.[354] This indicates that it is doubtful the international community will be able to agree enough to establish specific criteria for the use of force against the threats posed by rogue states and terrorist organizations. However, guiding principles can provide a starting point and can be proposed in a variety of ways. The United Nations could publish guiding principles through Security Council or General Assembly resolutions, or through statements by the President of the Security Council or Secretary-General.[355] Regional organizations and international scholars can also propose principles.[356] At the very least, several states can meet together to discuss possible rules for the use of force in these situations.

The state practices reviewed above combined with the National Security Strategy and comments by the United States' administration reveal some possible guiding principles. Condoleezza Rice provided three overarching guidelines to consider prior to arguing for a right of preemptive force: states must "exhaust other means, ... [t]he threat must be very grave[, a]nd the risks of waiting must far outweigh the risks of action."[357] These three

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[353] MURPHY, *supra* note 92, at 322.

[354] *See* Reisman, *supra* note 216, at 22-26.

[355] MURPHY, *supra* note 92, at 322.

[356] One scholar argues for an entirely new paradigm to control the proliferation of weapons of mass destruction. In his article, he details specific criteria such as notice of intention to use force to combat these threats; a concrete, persuasive threat including hostile intention combined with some recent acts; a finding that further delay will compromise security or increase civilian casualties; discriminate response; positive outcome; and force as a last resort. *See* Roberts, *supra* note 216, at 514-27.

[357] Rice, *supra* note 29, at 6.

principles incorporate the already existing principles of necessity and proportionality and can be further broken down. The following discussion is not an exhaustive list of principles, but rather recommendations of some items for consideration.[358]

1. Exhaust Other Means

While all of these principles are important, the overarching principle in accordance with the U.N. Charter's prohibition on the use of force is that the use of force should be the last option, not the first. The fear that the United States was moving away from multilateralism and toward a preference for the use of force was one leading reason the international community responded so soundly against the assertion of a right of unilateral preemptive self-defense.[359] Contrasting the idea that the United States is moving towards a preference for the use of force, the National Security Strategy emphasizes many multilateral actions to deny, contain, and curtail these threats short of using force.[360] Additionally, the National Security Strategy discusses the need to address the underlying conditions that lead to terrorist activities within states.[361] The National Security Strategy and state practice requires that the exhaustion of peaceful means prior to the use of force.

2. Grave Threat

When assessing the potential threat of attack or threat to obtain the capability to attack, states must consider several items. A serious threat, based on a combination of capability and hostile intent, must exist. The credibility of the evidence is a key factor

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[358] The breakdown of the three criteria incorporates recommendations by Roberts *supra* note 216, at 514-27. *See also* MURPHY, *supra* note 92, at 322-24.

[359] *See* Frankel, *supra* note 289.

[360] National Security Strategy, *supra* note 1, at 5-6, 14-15.

[361] *Id.* at 17-24.

because of the speculative nature inherent in assessing hostile intent and capability. Hostile intent can be inferred in a variety of ways, including actions provided in the National Security Strategy's description of rogue states: states that disregard international law in ways that threaten their neighbors; attempt to acquire weapons of mass destruction to be used as threats or offensively; and sponsor terrorism around the world.[362] States should keep in mind that the determination of hostile intent is often very subjective absent a specific statement or acts of hostile intent by a state or terrorist organization. A state that attempts to acquire weapons of mass destruction could be acting out of fear for its own security. Diplomatic interaction could easily provide another way to address the security concerns. If the threat is less imminent, the evidence must be very strong and the threat must have the potential of causing catastrophic damage.

3. Consider the Risks of Inaction versus Action

This principle requires the consideration of the destructive capability of the threat combined with the likely result of a strike against the capability. Questions to be considered are: will a strike cause mass casualties; will a strike be successful; and will a strike simply lead to more attacks.

The use of force must be proportionate to the threat and initially limited to the specific threat. For example, in 1998 the United States bombed specific terrorist sites in Afghanistan and Sudan belonging to bin Laden in response to prior terrorist attacks and to prevent future terrorist attacks. This did not deter the attacks. The magnitude of the September 11, 2001, terrorist attacks led the United States and many other states to, in

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[362] *Id.* at 14.

essence, declare war on bin Laden's organization. Additionally, in 1981, Israel struck Osirak, the specific nuclear facility in Iraq, rather than launch a full-scale attack on Iraq. A full-scale attack would have been disproportionate and would have been interpreted as a truly aggressive action completely destabilizing the Middle East. However, the strike did not deter Iraq's quest to obtain nuclear weapons as shown by the evidence obtained by the IAEA. Both of these situations reveal the requirement for proportionality, but also illustrate the fact that limited strikes, without taking other action to defuse the situation may not resolve the conflict, but lead to further problems.

Another portion of this principle requires the Security Council to evaluate the perception of any action taken. In the 1994 North Korean situation, North Korea stated that it would consider sanctions as an act of war. The United States and other countries did not impose sanctions, but rather worked out an agreement to defuse the situation. The Security Council must also consider the reaction by other states to the use of force. If the action can easily be interpreted as acts encouraged by a strong state to impose its will on a weak state, the action by the Security Council could be seen as illegitimate, absent strong rationale and evidence against this interpretation.

The problem with establishing criteria, even guiding principles, is that the principles can be abused by a state that intends to use force aggressively under the guise of fighting a threat. However, the international community will evaluate the evidence surrounding the use of force, like it currently does for anticipatory self-defense, and will address the legitimacy of the use of force.

Rogue states and terrorist organizations that attempt to obtain weapons of mass destruction are a significant threat to the peace and security of the international community.

If states allow the Security Council to address this threat, rogue states and terrorist organizations may be deterred without the use of force.[363] Additionally, states will have less legitimacy in arguing for the need for unilateral preemptive self-defense. As stated above, there are significant issues with the Security Council determining the need to use force in these situations, not the least of which is creating some guiding principles. However, the international community seems willing to address these threats and may set aside differences in order to find common ground to deal with these threats.

CONCLUSION

The evaluation of a right of unilateral preemptive self-defense as described in the 2002 National Security Strategy provides a complex debate and hurdle for the international community. In dissecting the issue slowly, the trends in state practice show not an acceptance of the right, but instead, a continued stance firmly against it.

Through adoption of the U.N. Charter after World War II, the world's leaders hoped to maintain international peace and security through the action of the Security Council. The Security Council, however, frequently failed to prevent or remove threats to peace by their inaction or failure to garner support due to political considerations, which led to exasperated states responding to threats in self-defense. International scholars and states accept the right of anticipatory self-defense against an imminent threat as a legitimate use of force under the U.N. Charter. The United States tried to push this further through the National Security

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[363] One scholar notes that "[t]he knowledge that the Council had armed forces at its disposal and that it would use force if necessary would make it easier for the Council to resolve disputes without resort to force." MCCORMACK, *supra* note 77, at 194-195.

Strategy by arguing that the threat of rogue states and terrorist organizations that attempt to obtain weapons of mass destruction requires action before these threats materialize because the devastation caused by these threats is catastrophic. While these threats are a legitimate concern, the international community is not willing to give one state, especially a global superpower like the United States, the ability to decide unilaterally that a future threat exists and that force must be used to neutralize the future threat. The international community is willing to accept that these threats are credible threats that must be controlled, but the action must be multilateral, not unilateral. If the international community is not willing to address these threats through the Security Council, regional organizations may step up. As a last resort, states will continue to use force unilaterally in self-defense, and may expand the use of force to handle threats preemptively.

This paper began with examining basic facts about the right of self-defense. The first inquiry looked at the history of the doctrine of self-defense and addressed whether there is a customary international right of self-defense in addition to the right provided for in Article 51 of the U.N. Charter. The I.C.J. in *Nicaragua* clarified the issue by ruling that both rights co-exist and one helps interpret the other so that essentially, they are now the same. The second inquiry examined whether this right of self-defense includes the right to act in anticipatory or preemptive self-defense. The U.N. Charter is ambiguous on whether a right of anticipatory self-defense remains. International scholars and states argue over a restrictive or counter-restrictive view of the U.N. Charter, but since the end of the Cold War, the majority accepts some form of anticipatory self-defense, limited by the necessity to act based on an imminent threat with a lack of peaceful options and a proportionate response to the threat. The international community does not accept a right of unilateral preemptive self-defense for

threats that are more removed and speculative. Although the United States has argued for this right, it has not actually used it.

The use of unilateral preemptive self-defense is contrary to the U.N. Charter framework as demonstrated by the international community's response to the National Security Strategy and the discussions leading up to the 2003 War in Iraq. An acceptance of a unilateral preemptive doctrine could easily result in other states in current conflicts to strike preemptively. This situation can result in an escalation of instability in current tense situations such as India and Pakistan, Israel and the Palestinian community, China and Taiwan, or Russia and Georgia. Without specific guidelines on the use of force to counter these new threats, however, unless there is a clear-cut case of aggression, it will be hard for the international community to find legal justification, not just to condemn the action, but also to enact sanctions against the aggressing state. The unilateral use of preemptive force contrary to the provisions of the U.N. Charter could lead to the "loss of the normative protection against intervention."[364] If this occurs, then the U.N. Charter framework will fail, having not adapted to adequately control current threats to the international peace and security. Sadly, the result will be a return to the days prior to the U.N. Charter when "might makes right" ruled the international community.[365]

The international community was galvanized by the terrorist attacks of September 11, 2001, and the National Security Strategy's claim of unilateral preemptive action. It has made great strides in accepting the need for the use of force to deter these threats. If the

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[364] Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?* 96 AM. J. INT'L L. 359, 363 (2002).

[365] *See* John Temple Swing, *Afterword, in* MIGHT V. RIGHT, *supra* note 103, at 177.

international community through treaties, or the Security Council through action under Chapter VII, actually follows through with these strides, states will not need to argue for unilateral preemptive action and the U.N. Charter framework maintaining international peace and security will continue to be preserved. The international community faces two opportunities to test its resolve to control these threats – the proliferation of nuclear weapons in Iran and North Korea. How it decides to resolve these situations will have lasting consequences on the U.N. Charter and the international rule of law.